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No. 88-1726

In The

Supreme Court of the United States

October Term, 1988

STEVEN DOE & MARGARET DOE, *et al.*,

Petitioners,

vs.

HENNEPIN COUNTY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER A MUNICIPALITY AND ITS SOCIAL WORKERS MAY BE HELD LIABLE UNDER 42 U.S.C. § 1983 FOR ACTING WITH DELIBERATE INDIFFERENCE TO THE LEGAL RIGHTS OF PARENTS AND CHILDREN IN NEEDLESSLY REMOVING CHILDREN FROM THE FAMILY?

II. WHETHER GOVERNMENT SOCIAL WORKERS ENJOY QUALIFIED IMMUNITY WHENEVER THEIR ACTIONS ARE NOT SUBJECTIVELY MALICIOUS?

III. WHETHER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES THAT A PARENT BE INFORMED OF ALLEGATIONS OF ABUSE OR NEGLECT AND BE GIVEN AN OPPORTUNITY TO RESPOND BEFORE A SOCIAL WORKER ACTS IN A NON-EMERGENCY SITUATION TO REMOVE A CHILD FROM THE FAMILY?

PARTIES

Due to the sensitive nature of this case, petitioners are proceeding under the assumed name of "Doe." *See* June 28, 1983 order of the district court. The petitioners in this court, who were the plaintiffs in the proceedings below, are Steven Doe and Margaret Doe, individually and as the natural guardians of Jane Doe and Jean Doe, their minor children.

Respondents are Hennepin County, Minnesota; Hennepin County Community Services Department Social Services Division - Child Protection; Hennepin County Community Services Department Social Services Division - Child Protection - Acute Unit; Raymond Ahrens, Division Director, individually and in his official capacity; Milton Henry, Supervisor, individually and in his official capacity; Gail Guthrie, Child Protection Worker, individually and in her official capacity; Carolyn McHenry, Child Protection Worker, individually and in her official capacity; Judith DuPre, Legal Section Worker, individually and in her official capacity; Sinnika Lundeen, Supervisor, individually and in her official capacity; Richard Merwin, Supervisor, individually and in his official capacity; and, James Christianson, Supervisor, individually and in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 6, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirming the United States District Court for the District of Minnesota is reported in 858 F.2d 1325 (1988), and is reprinted at App. 1 to App. 13 of the Appendix to this Petition.

The opinions of the United States District Court for the District of Minnesota (No. 4-84-115) dismissing the ac-

tion are reprinted at App. 15 to App. 42 of the Appendix to this Petition.

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JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1988. A timely petition for rehearing en banc was filed on October 20, 1988. The Court of Appeals issued its order denying the petition on November 21, 1988.

This petition for a writ of certiorari has been timely filed within the period allowed by Justice Blackmun's Order of February 7, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

—o—

STATUTE INVOLVED

This case involves 42 U.S.C. § 1983 (1982), which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

—o—

STATEMENT OF THE CASE

On December 7, 1982, an anonymous caller telephoned Hennepin County Child Protection and expressed concern about the Doe children to Lora Guidera. (App. 30). He refused to give his name but did identify himself as a frequent visitor to the home. (*Id.*) He made vague and bizarre allegations which, if accepted as true, implied that the Does' two daughters, aged 2 and 4, may have been sexually abused by their father. (*Id.*)

In response, Guidera provided the information to her supervisor, Sinnika Lundeen, who took no action on the file other than to give it two days later to Carolyn McHenry, who was leaving for a vacation. (*Id.*) While McHenry was on vacation skiing in Colorado, no action was taken. (*Id.*) On December 13, 1982, the anonymous caller telephoned again and was referred to Gail Guthrie, who knew something about the case from an earlier conversation with McHenry. (*Id.*) The caller made essentially the same allegations he had made the previous week. (*Id.*)

When McHenry returned from vacation on December 14, 1982, Guthrie informed her of the second telephone call. (*Id.*) None of the defendants attempted to contact the Doe family, investigate the reliability of the anonymous complaint, or determine whether the children were in need of immediate care. (App. 30-31). On December 14, 1982, however, McHenry did contact the City of Mound Police Department, which commenced a criminal investigation. (App. 31). The police investigation did not yield any new evidence or corroborate the allegations. (*Id.*) The police did contact numerous neighbors of the Does, who indicated

they knew of no evidence of any abuse, and on December 17, 1982, the police visited briefly with Mrs. Doe, but they were vague in indicating the reason for their visit and did not delineate the charges. (App. 31-32).

On the first workday after the police visited her, December 20, 1982, Mrs. Doe contacted Child Protection and spoke with McHenry. (App. at 32). She pleaded for Child Services to meet with the family. (*Id.*) McHenry agreed to meet Mrs. Doe at her home the following morning at 9:30 a.m. but subsequently rescheduled the appointment for 1:00 p.m. (*Id.*) She told Mrs. Doe that the rescheduling was necessary to allow McHenry to be in court, but McHenry actually was meeting with Guthrie and the Mound Police Chief and investigating officer. (*Id.*)

Guthrie and McHenry urged the police to exercise their emergency hold powers and take the children into custody, but the police refused to do so. (*Id.*) The police said there was a lack of evidence of an emergency. (App. to Plaintiffs' Memorandum in Opposition to Hennepin County Defendants' Motion for Summary Judgment, Doc. No. 7). McHenry did not keep her rescheduled appointment with Mrs. Doe. (App. 32). She had her office inform Mrs. Doe that McHenry was still in court, while in fact, McHenry, Guthrie, and Judith DuPre were preparing a petition to be filed with the juvenile court *ex parte* to obtain an emergency order for removal of the children. (App. 32-33). The petition filed by the defendants contained clear exaggerations of the alleged sexually precocious behavior by the girls. (App. 33-34). The petition also contained one complete fabrication by the defendants creating the impression that there was an emergency: They falsely

alleged in the sworn petition that the Does were intending to move the children to Chicago to avoid the investigation. (*Id.*)

The juvenile court granted the relief requested by the defendants in the petition, and on December 21, 1982, at approximately 7:00 p.m., two uniformed sheriff's deputies and two uniformed Mound police officers went to the Doe home and removed the children. (App. 34). The children were taken to the Home Away for Tots, where they were separated from each other. (*Id.*)

On December 22, 1982, the juvenile court held a preliminary post-deprivation hearing. (*Id.*) At the hearing the defendants falsely implied that the allegations of abuse had come from more than the one source of the anonymous caller, clearly leaving the court with the false impression that the allegations of abuse had been corroborated. (App. 35). On the basis of defendants' deceptive testimony the juvenile court temporarily extended the order separating the children from their parents. (*Id.*)

On December 23, 1982, an independent social worker hired by the defendants interviewed the children. (*Id.*) Afterward, he informed the defendants that the children denied any sexual advances upon them by either parent. (*Id.*) Also during the days immediately after the December 22 hearing, defendants attended the depositions of the anonymous informant, who had been identified as one Adrian Yackley, and his wife. Mrs. Yackley's deposition cast serious doubts on the veracity of her husband's allegations and provided reasonable explanations for the events observed. (*Id.*) The deposition of Mr. Yackley demonstrated his animosity toward Mr. and Mrs. Doe and

verified that Yackley erroneously suspected his wife of having an affair with Mr. Doe. (*Id.*)

On January 5, 1983, Hennepin County caseworker Richard Cronk went to the Doe home and interviewed the Does and their children. (App. 36). This was the first time a Hennepin County employee met with any of the family members or observed the Doe home. (*Id.*) Based upon this visit, Cronk recommended to the defendants that the matter should be dropped, because of his belief that the allegations against the Does were without foundation. (*Id.*) On January 6, 1983, the juvenile court was to hear the Does' appeal from its December 22 order. (*Id.*) However, prior to the hearing the parties reached an agreement allowing for the immediate return of the children to the custody of their parents. (*Id.*) Thus, the children were away from their parents' custody through the Christmas and New Year's holidays for a period of sixteen days, from December 21, 1982 to January 6, 1983. (*Id.*)

As the direct and proximate result of the trauma suffered by the Doe family members in this matter, each of the parents and children has been caused to suffer post-traumatic stress disorder, diagnosed by a clinical psychologist. (Addendum to Brief of Appellants, Doc. IX at 2). Further, Mr. and Mrs. Doe have been caused substantial financial hardship and a marital separation as a result of this event in their lives.

The original allegations by the anonymous caller were unfounded. (App. 2).

Plaintiffs, Steven and Margaret Doe, individually and as the natural guardians of Jane and Jean Doe, minor

children, brought this action[1] for damages and injunctive relief, alleging deprivation of their civil rights and basing their complaint on 42 U.S.C. §§ 1983 and 1985(3) and various state tort theories. Jurisdiction was alleged pursuant to 28 U.S.C. § 1331(a), 28 U.S.C. § 1343, and 42 U.S.C. §§ 1983, 1985, and 1988.

Shortly after the commencement of the action the Hennepin County defendants and Adrian Yackley made motions to dismiss, or, in the alternative, for summary judgment. On June 27, 1984, the district court entered an order dismissing the action against defendant Yackley, dismissing plaintiffs' claims based on 42 U.S.C. § 1985(3), and denying defendants' motions in all other respects, including claims of absolute immunity and qualified immunity.

After substantial discovery, the Hennepin County defendants made another motion for summary judgment in late 1986. After the decision of the court of appeals in *Myers v. Morris,* 810 F.2d 1437 (8th Cir. 1987), the district court invited further briefing on the significance of that case to this case. On July 1, 1987, the district court granted the Hennepin County defendants' motion for summary judgment on the federal claims on the grounds of qualified immunity, citing *Myers v. Morris,* and dismissed those claims with prejudice. (App. 27-42). The court further

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[1]The original action was against Adrian Yackley, the City of Mound, Minnesota and its police chief and investigating officer, and psychologist Mindi Mitnick in addition to the respondents. Yackley was dismissed by the district court, and the other parties not respondents herein were dismissed by stipulation in the court of appeals.

dismissed plaintiffs' state law claims, without prejudice, for lack of subject matter jurisdiction and granted a motion by the City of Mound defendants for leave to file a dispositional motion. (App. 42). Subsequent to the filing of a motion for summary judgment by the City of Mound defendants and the filing of a motion for reconsideration by the plaintiffs, on August 13, 1987, the district court issued an order which denied the motion to reconsider, granted all defense motions for summary judgment on the grounds of qualified immunity, citing *Myers* as authority, and dismissed all federal claims with prejudice and all state law claims without prejudice. (App. 26).

Petitioners brought a timely appeal to the United States Court of Appeals for the Eighth Circuit, and the Eighth Circuit issued its decision and order on October 6, 1988, affirming the judgment entered in the district court. (App. 1-11). The Eighth Circuit affirmed the dismissal of petitioners' claims under 42 U.S.C. § 1983, holding that the respondents were entitled to qualified immunity and that the State's intervention on behalf of the allegedly abused children did not infringe the parents' liberty interests in the family without due process of law because the State provided an adequate post-deprivation hearing. (App. 10-11). The decision by the Eighth Circuit is the subject of this petition for a writ of certiorari.

Deposition testimony by the respondents shows that they were aware of the existence of and the contents of the clear and mandatory Minnesota law in effect at that time, which is set forth in the court of appeals opinion. (App.

4-5, notes 2 and 3). Respondents violated the regulations in numerous material respects, including failing to contact the parents within 24 hours of receiving the charges, failing to conduct a social services investigation into the allegations until 29 days after the first report, failing to offer the parents placement alternatives to emergency foster care, and failing to provide plaintiffs with the opportunity to cooperate and to avail themselves of any social services, such as counseling, which would have allowed them to avoid forcible removal of the children. (Defendants' deposition excerpts set forth in Addendum to Brief of Appellants). These wrongful actions were consistent with the custom and policy of defendant Hennepin County.[2] (*Id.* and Appellants' Addendum Docs. VII & VIII).

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[2]The record contains substantial evidence of the existence of an unconstitutional policy and custom causally related to petitioners' injuries, and petitioners had argued that they were entitled to injunctive relief and damages in accordance with *Monell v. Dept. of Soc. Serv. of N.Y.*, 436 U.S. 658, 690-691 (1978); *Patzner v. Burkett*, 779 F.2d 1363, 1366-1367 (8th Cir. 1985). *See* Brief of Appellants at 35-42; Reply Brief of Appellants at 20-24. However, these issues are not discussed in the Eighth Circuit opinion filed October 6, 1988, which states only that, "We have carefully reviewed the Does' other claims and find none of them persuasive." (App. 11). One element of the custom and policy was the failure to train its employees. *See* Second Amended Complaint ¶ 22(v); Brief of Appellants at 35-38; Reply Brief of Appellants at 21-24. On that issue the Eighth Circuit did not have the benefit of this Court's decision in *City of Canton, Ohio v. Harris*, 109 S. Ct. 1197 (1989).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT HOLDING THAT GOVERNMENT SOCIAL WORKERS, WHO ACTED WITH DELIBERATE INDIFFERENCE TO THE RIGHTS OF PETITIONERS IN DEPRIVING THEM OF NOTICE AND AN OPPORTUNITY TO BE HEARD AND IN DECEIVING THE STATE COURT TO OBTAIN AND TO MAINTAIN AN ORDER REMOVING THE CHILDREN FROM THE HOME IN A NON-EMERGENCY SITUATION, DID NOT COMMIT A CONSTITUTIONAL TORT ACTIONABLE UNDER 42 U.S.C. § 1983 IS AN IMPROPER DEPARTURE FROM ESTABLISHED § 1983 PRINCIPLES.

The decision of the Eighth Circuit that petitioners have no claim for a constitutional tort defies § 1983 principles established by this Court and numerous circuit court of appeals decisions. A government official who acts to deprive another of a constitutionally protected interest with deliberate indifference to the rights of the aggrieved party may be held liable for a constitutional tort under 42 U.S.C. § 1983, whether the indifference is manifested by intentional acts of commission or omission.[3]

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[3]This Court's recent decision in *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989) is inapposite. *DeShaney* holds that "the Due Process Clause does not require the State to provide citizens with particular protective services." 109 S. Ct. at 1004. The person doing harm to the child in *DeShaney* was the child's father, not a state actor. *Id.* at 1003, 1006. In this case the county social workers are alleged affirmatively to have inflicted harm on the plaintiffs. Because this Court held that the social workers in *DeShaney* were not liable in the context of such grievous facts ("The facts of this case are undeniably tragic." *Id.* at 1001), it is especially

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Estelle v. Gamble, 429 U.S. 97, 104-105 (1976). *Cf., City of Canton, Ohio v. Harris,* 109 S. Ct. 1197, 1206 (1989) (A municipality may be held liable under § 1983 for failure to provide proper training to its employees when the failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.)

"This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dept. of Soc. Serv. of Durham Co.,* 452 U.S. 18, 27 (1981), quoting from *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). This liberty interest may be described as the right of family privacy or togetherness. *See, e.g., Lehr v. Robertson,* 463 U.S. 248, 258 (1983); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Smith v. Organization of Foster Families for Equality & Reform,* 431 U.S. 816, 842 (1977). Although the Eighth Circuit decision appears not to recognize it, petitioners have a constitutionally protected liberty interest in family unity. "The fundamental liberty interest of

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important that the Court decide a case which clarifies the constitutional standards for social worker liability under § 1983. "[T]he State . . has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap." *Id.* at 1011 (Brennan, J., dissenting). The goal of child abuse prevention would be served by a declaration from the Court that the Constitution does not allow for deliberate indifference to the best interests of the child by social workers who *take action* depriving children and their parents of protected liberty interests.

natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents . . . ." *Santosky*, 455 U.S. at 753.

This Court can assume without having to decide that Minnesota law[4] establishes a standard for determining when a child may be removed from the family, which is in harmony with the necessary level of protection of the family's liberty interest. Under state law the standard for determining whether a child lawfully may be removed from the family is whether it is in the best interests of the child to do so.[5] The application of the standard obviously requires an objective inquiry into whether there is an emergency, whether the parents are fit to meet the needs of the child, and whether the child in fact is being abused or neglected. Likewise, removal of a child from the family under a reasonable application of the standard requires some evidence that it is in the best interests of the child to do so, such as evidence that the child is in danger, that the parents are unfit, or that the child is subject to abuse

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[4]MINN. STAT. ANN. § 626.556 and MINN. R. 9560.0208 (1982) which are set forth in the Eighth Circuit decision (App. 4-5, notes 2 and 3).

[5]The Minnesota statutes and regulations are similar to those in most states and *ipso facto* define the appropriate standard to be followed by an objectively reasonable social worker. In cases of alleged abuse or neglect, a social worker is faced with the question of whether it is in the best interests of the child to remain in the family or to be removed from the family. The worker must balance the likelihood of harm to the child from being removed from the family against the likelihood of harm to the child mentally or physically by remaining within the family. Thus, under state law a social worker is privileged to take action to deprive a family of its liberty interest in togetherness, if it is more probable than not that but for the separation the child will be subjected to physical or mental injury.

or neglect. In this case the social workers were deliberately indifferent to the need for an objective inquiry. Moreover, they were deliberately indifferent to whether there was a true emergency, whether or not the parents were fit, and whether in fact the children were being abused or neglected. Thus, they were deliberately indifferent to the best interests of the child standard, while they nonetheless aggressively and fraudulently undertook to remove the children from the home.[6] Those actions constituted a constitutional tort.

This Court, discussing in other cases what process is due in depriving a family of its liberty interest in unity, has left no room for doubt that at least *some* process is due. In "*Lassiter*, the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interests supporting use of the challenged procedure." *Santosky*,[7] 455 U.S. at 754.

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[6]Henley, J., concurring in this case, said: "At the very least, the parents were entitled to demand that the State conduct a minimally adequate investigation before forcibly removing the children from the home. Here, the social workers' lackadaisical attitude at the outset (i.e., failure to quickly investigate Yackley's allegations) is totally at odds with their subsequent haste in petitioning for removal of the children. Weight is added to appellants' due process claim by governmental reliance on what has been described charitably as 'exaggerated' allegations and . . . 'false inferences' by agency officials." (App. 12-13).

[7]Although *Santosky* dealt with proceedings for permanent termination of parental rights, there is no reason why the *Math-*

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Applying the *Mathews* test to this case, Judge Henley, concurring separately in the court below, said:

> The private interest here, preservation of the family from governmental intermeddling, would . . . be of the highest order. As an offset, however, the government has a strong interest in protecting children from abuse and neglect.

(App. 12). Clearly, in this case, as indeed in most cases of alleged abuse and neglect, the risk of error is high.[8]

Petitioners acknowledge that no claim under § 1983 lies against a social worker who merely negligently acts to remove a child from the family in a situation where the allegations of abuse or neglect are unfounded. *Cf. Parratt v. Taylor,* 451 U.S. 527 (1981); *Daniels v. Williams,* 474 U.S. 327 (1986); *Davidson v. Cannon,* 474 U.S. 344 (1986). However, a constitutional tort actionable under § 1983 is committed by a social worker who deprives a family of its liberty interest in unity with deliberate indifference to the legal rights of the parents and children. *Cf. Estelle v. Gamble,* 429 U.S. at 104-105. The best interests of the child standard—the state law standard—is the standard that this Court can assume reflects the appropriate balance between the liberty interests at stake and the welfare of the child. *See supra* at 12-13. Therefore, separating a child from the family with deliberate indifference to the

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ews analysis would be inappropriate in this case in determining what process petitioners were due in the temporary deprivation of their protected liberty interests.

[8]The risk is that the deliberately indifferent social worker may overreact, as ultimately occurred in this case, or may be too complacent, as in the initial phases of this case and as seems to be so in *DeShaney*. *See supra* note 3, at 10.

best interests of the child standard is by definition a deprivation without due process of the child's and the parents' liberty interest in family unity. Moreover, if the actions of the social worker are undertaken with reckless disregard for the best interests of the child standard, then punitive damages may be awarded. *Cf., Smith v. Wade*, 461 U.S. 30, 56 (1983).

The decision of the Eighth Circuit is inconsistent with the decisions of other circuit courts of appeals properly applying § 1983 standards and principles to alleged wrongful actions by social workers. *See Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 143 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983) (Gross negligence by social workers creates a strong presumption of deliberate indifference, which is actionable under § 1983.); *Taylor v. Ledbetter*, 818 F.2d 791, 795-796 (11th Cir. 1987) (en banc), *cert. denied sub nom. Ledbetter v. Taylor*, 109 S. Ct. 1337 (1989) (Government agencies and officials may be held liable under § 1983 if they are deliberately indifferent to specific responsibilities and that indifference deprives the plaintiff of constitutionally protected rights); *Germany v. Vance*, 868 F.2d 9, 18 (1st Cir. 1989) (Government social workers whose actions reflect reckless or callous indifference may be held liable for deprivation of constitutionally protected liberty interests); *Estate of Bailey v. County of York*, 768 F.2d 503, 508 (3rd Cir. 1985) (Allegations of deliberate indifference, reckless disregard or gross negligence by an agency or its officials adequately meets the standard of conduct actionable under § 1983).

Likewise, the failure of the Eighth Circuit to recognize petitioners' claim deriving from the social workers' ap-

parent deliberate indifference to the best interests of the children is inconsistent with numerous holdings by other circuit courts of appeals where constitutionally protected interests have been deprived by more than mere negligence. *See, e.g.,* cases cited from the Second, Third, and Sixth Circuits in *Archie v. City of Racine*, 847 F.2d 1211, 1220 n.8 (7th Cir. 1988) (en banc) *cert. denied*, 109 S. Ct. 1338 (1989). *See also Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421, 1424-1425 (9th Cir. 1988); *Edwards v. Gilbert*, 867 F.2d 1271, 1274-1275 (11th Cir. 1989).

II. THE DECISION OF THE EIGHTH CIRCUIT DEPARTS FROM THE STANDARDS FOR GRANTING QUALIFIED IMMUNITY SET FORTH IN HARLOW v. FITZGERALD AND ANDERSON v. CREIGHTON BY ERRONEOUSLY INJECTING A SUBJECTIVE ELEMENT INTO THE ANALYSIS, AND THE ABERRANT RESULT SETS AN IMPROPER PRECEDENT.

The doctrine of qualified immunity shields public employees from civil litigation for damages "as long as their actions could reasonably have been thought consistent with rights they are alleged to have violated." *Anderson v. Creighton*, 107 S. Ct. 3034, 3038 (1987). *In Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that the subjective inquiry of whether a government official had acted with malicious intent was irrelevant to a determination of immunity from suit and that the sole inquiry should be whether an objectively reasonable official would recognize that his actions were violating a clearly established right. 457 U.S. at 815-819; *Anderson*, 107 S. Ct. at 3038; *see* Balcerzak, *Qualified Immunity for Government*

Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L.J. 126, 132-134 (1985). However, the standard employed by the Eighth Circuit to determine the application of the doctrine of qualified immunity in this case imports a subjective element regarding the motivation or state of mind of the government social workers. This mistake yields a decision which is directly contrary to *Harlow* and *Anderson*.

Specifically, the Eighth Circuit held that respondents' "errors do not rise to the level of constitutional significance because there was *no evidence of motive* to fabricate evidence *or malice* toward the Does."[9] (App. 11 [emphasis added]). As if to underscore that the holding in this case applies the doctrine of qualified immunity by importing a subjective element regarding motivation or state of mind, Henley, J., concurring, states:

> In the totality of the circumstances, I have serious doubt that the procedures actually followed comport with due process. *Even so, I cannot disagree with the court's holding that appellees are protected by qualified immunity. The district court found no evidence of malice or improper motives.*
>
> * * * While I think it is arguable that appellees did not act in an "objectively reasonable manner," . . . the result reached by the court is one with which I am not prepared to disagree. (App. 13 [emphasis added]).

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[9]The Eighth Circuit decision acknowledges that, "The district court did note that certain allegations were exaggerated and that agency officials made false inferences at the hearing." (App. 11). Henley, J., concurring, said the social workers' wrongdoing "has been described charitably as 'exaggerated' allegations and . . . 'false inferences' . . . ." (App. 13).

In a significant departure from the clear holdings in *Harlow* and *Anderson*, the Eighth Circuit stated, "This claim is barred by qualified immunity unless evidence of malice or improper motives on the part of defendants is proved." (App. 11, citing *Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir. 1987)). Thus, the Eighth Circuit erroneously opens the door to subjective state-of-mind considerations in determining whether the doctrine of qualified immunity applies to government social workers. This improper precedent is likely to be followed in future decisions by the Eighth Circuit and by other circuit courts of appeals unless the decision is reversed by this Court.

If the proper objective reasonableness test of *Harlow* and *Anderson* were employed in this case, the government social workers would not be entitled to qualified immunity. They substantially embellished the allegations in the sworn petition presented to the juvenile court, creating the false impression that there was an emergency requiring removal of the children from the home, and they actually fabricated the allegation that the Does were intending to move the children to Chicago to avoid this investigation—the only allegation in the petition that made it appear to be a bona fide emergency. *See supra* at 4-5. They further deceived the juvenile court at the first (post-separation) hearing, creating the false impression that the anonymous allegations had been corroborated by a second source, thus managing to extend and maintain the court order removing the children from the home. *See supra* at 5.

A social worker who presents a false petition to a court and fabricates testimony or evidence before a court is properly denied immunity. *See Austin v. Borel*, 830 F.2d

1356, 1363 (5th Cir. 1987) (Child protection workers are not entitled to summary judgment on the grounds of qualified immunity if there is evidence sufficient to create a genuine issue as to whether they in fact filed a false verified complaint.) *Cf. Myers v. Morris,* 810 F.2d at 1458 ("We are presented with no factual specificity or record support for the contention that the deputies deliberately falsified reports or reported falsehoods of which they were or should have been aware.") The wrongful actions of the social workers in this case could not "reasonably have been thought consistent with rights they are alleged to have violated." *Anderson v. Creighton,* 107 S. Ct. at 3038.

> It is this type of flagrantly abusive conduct on the part of officials charged with upholding the public trust that the civil rights remedies were principally designed to deter. It would be most ironic if *Harlow* were to preclude effective redress for those constitutional violations for which victims are most in need of compensation and for which officials are least deserving of immunity.
>
> When an official is charged with a constitutional violation entailing gross abuse of his power and position, society has no interest in seeing that the burden of litigation is eased so that it does not interfere with the discharge of his duties. To the contrary, it is in society's interest to ensure that such conduct is unequivocally deterred.

Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,* 95 Yale L.J. 126, 141 (1985) (footnote omitted).

The deliberate indifference of the social workers in this case to the rights of petitioners strips them of qualified immunity. The record evidences actions which any reasonably competent social worker, in the same circum-

stances, would have known were inconsistent with the rights of petitioners. *Cf., Anderson v. Creighton.* A reasonably competent social worker would have known that at least a minimal investigation of the facts was warranted before attempting removal of the children. Certainly, a reasonably competent social worker would have known that defrauding a court to obtain removal of the children violated the due process rights of the parents and the children.

Social workers are often heard to say that in the difficult area of alleged child abuse or neglect they walk a fine line requiring them to balance competing interests of the children and the parents.[10] They argue that, because the problem of child abuse or neglect is so serious and their job is so sensitive, they should be immune from liability. However, it is precisely because the problem of child abuse or neglect is so serious and the job of a social worker is so sensitive, that the Court should deny qualified immunity to those who act with deliberate indifference or act recklessly or clearly unprofessionally in a manner that could not reasonably have been thought consistent with the rights of others. The failure to do so has grave implications for the well-being of children, parents, and families everywhere.

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[10]Actually, the legal interests of the children and the parents are the same. *Cf. Stanosky v. Kramer,* 455 U.S. 745, 760-761 (1982) (The child and his parents share a vital interest in preventing an erroneous termination of their natural relationship; the interests of the child and his parents coincide.) Despite the liberty interest in family unity, a child may be removed from the family in cases of alleged abuse or neglect, *if* it is in the best interests of the child to do so. *See supra* at 12 n.5. Therefore, the social worker is balancing the relative factors related to what is in the best interests of the child, not competing interests of the parents and the child. *Id.*

III. THE DECISION OF THE EIGHTH CIRCUIT, WHICH FAILS TO RECOGNIZE THAT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PETITIONERS WERE ENTITLED TO MINIMALLY ADEQUATE NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE THE CHILDREN WERE REMOVED FROM THE HOME IN A NON-EMERGENCY SITUATION, IS CONTRARY TO THE PRINCIPLES ENUNCIATED BY THIS COURT IN GOSS v. LOPEZ AND CLEVELAND BOARD OF EDUCATION v. LOUDERMILL.

Before the decision was made by the respondents to seek an *ex parte* order from the juvenile court removing the children from the home (and after the police had refused to exercise their emergency power to take custody of the children, citing the lack of an emergency) social worker Carolyn McHenry purposefully denied Mrs. Doe any notice of the allegations of abuse or neglect and the opportunity to be heard in response to the allegation that the Doe children were in danger. *See supra* at 4. After Mrs. Doe had taken the initiative to contact McHenry to request a visit to the home and the opportunity to discuss whatever concerns McHenry may have had, McHenry fraudulently led Mrs. Doe into believing such a meeting would take place and actually proceeded immediately with Gail Guthrie and Julie DuPre to prepare and present the fraudulent petition to the juvenile court.[11] Petitioners

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[11]These actions also were taken despite the fact that the Minnesota regulations mandated that "the local social service agency shall contact the family within 24 hours," that "the child

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argued to the Eighth Circuit that these actions deprived them of minimally adequate notice and opportunity to be heard prior to the deprivation of their liberty interest in family unity. *See, e.g.*, Reply Brief of Appellants at 8-11. Although the Eighth Circuit decision acknowledges that the district court found that "in conducting their investigation the defendants erred in some matters such as not providing proper notice to the Does," (App. 6) the decision does not discuss this argument, except to say that, "We have carefully reviewed the Does' other claims and find none of them persuasive." (App. 11).

In so doing, the Eighth Circuit decision failed to recognize the fundamental principles enunciated by this Court in *Goss v. Lopez*, 419 U.S. 565 (1975) and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Even if the specific process mandated by state law constitutes more than petitioners were due, the fact remains that *some* pre-deprivation process is required by the Due Process Clause. "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to

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protection worker shall assess the validity of the complaint," that "the parents must be given the opportunity to voluntarily place the child or seek an alternative that in the worker's judgment assures the safety of the child," that "the local social service agency shall, whenever possible, provide services that preserve the child within the family unit while at the same time ensuring the child of a safe environment," and that only after such steps have been taken, "If services necessary to provide the child a safe environment are rejected, the child protection worker shall petition the court for authorization to intervene." *See* MINN. R. 9560.0208 (1982) appearing at n.3 of the Eighth Circuit decision. (App. 4-5).

the nature of the case.' " *Loudermill*, 470 U.S. at 542, quoting from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also Lopez*, 419 U.S. at 579. "The root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing *before* he is deprived" of a constitutionally protected interest. *Loudermill*, 470 U.S. at 542. "Some kind of a hearing" is required prior to the deprivation of a constitutionally protected interest. *Id.*

Like the respondent's interest in retaining employment in *Loudermill*, the significance of the private interest of the petitioners in this case in retaining family unity and continuity "cannot be gainsaid." 470 U.S. at 543. In this case, as in *Loudermill*, "some opportunity" for the parents and the children to present their side of the case is "of obvious value in reaching an accurate decision." *Id.* "Even where the facts are clear, the appropriateness or necessity of . . . [the contemplated action] may not be; in such cases the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect."[12] *Id. See also Goss v. Lopez*, 419 U.S. at 583-584, cited in *Loudermill*, 470 U.S. at 543 n.8.

Just as in *Loudermill*, all of the Doe family members "had plausible arguments to make that might have pre-

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[12]The decisionmaker in this case, like *Loudermill*, was guided by standards set forth in clear and mandatory state law. The social worker's decision to petition the juvenile court for intervention properly comes only after services necessary to provide the child a safe environment in the home are rejected by the parents. MINN. R. 9560.0208 subp. 4 (1982). Thus, although the social worker's decision to seek *ex parte* removal of the child is reviewable in a post-deprivation hearing, as was the decisionmaker's decision to terminate the employee in *Loudermill*, it is the pre-deprivation decision which is critical.

vented'' their loss of liberty. *Id.* at 544. In this case, analogous to *Loudermill,* the fact that the respondents saw fit to return the Doe children to their parents upon meeting the family and giving them an opportunity to be heard ''suggests that an error might have been avoided had [t]he[y] been provided an opportunity to make . . . [their] case.'' *Id.* In light of social worker Richard Cronk's recommendation, after first visiting the Does, that the Doe children should be returned to their parents, it is plausible that "a fully informed decisionmaker might . . . have exercised its discretion and decided not to . . . [take the contemplated action], notwithstanding its authority to do so.'' *Id.* ''In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.'' *Id.*

The legitimate governmental interest of the respondents in the protection of children alleged to be abused is not hurt by requiring that the parents and the children have the opportunity to be heard prior to seeking removal of the children from the home. Certainly, the record contains no evidence of potential harm to the legitimate governmental interest of the respondents. Because there are substantial post-deprivation remedies for the petitioners under Minnesota law, ''The only question is what steps were required before the termination took effect.'' *Id.* at 545. ''[T]he pretermination 'hearing' though necessary, need not be elaborate.'' *Id.* The hearing in this case, as in *Loudermill,* ''should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges . . . are true and support the proposed action.'' *Id.* at 545-546. However, ''The opportunity to

present reasons, either in person or in writing, why proposed actions should not be taken is a fundamental due process requirement." *Id.* at 546.

In this case, when McHenry denied Mrs. Doe the opportunity to have a simple conversation before McHenry and her associates undertook to petition the juvenile court, she denied the petitioners fundamental due process guaranteed by the Due Process Clause of the fourteenth amendment.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Alternatively, the petition should be granted summarily, the decision of the Eighth Circuit should be vacated, and the case should be remanded for further proceedings and jury trial in the United States District Court for the District of Minnesota.

Respectfully submitted,

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April 1989

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-5401

Steven Doe and Margaret Doe, individually and as the natural guardians of Jane Doe and Jean Doe, minor children, Appellants, v. Hennepin County; Hennepin County Community Services Department Social Services Division—Child Protection; Hennepin County Community Services Department Social Services Division—Child Protection —Acute Unit; Raymond Ahrens, Division Director, individually and and in his official capacity; Milton Henry, Supervisor, individually and in his official capacity; Gail Guthrie, Child Protection Worker, individually and in her official capacity; Carolyn McHenry, Child Protection Worker, individually and in her official capacity; Judith DuPre, Legal Section Worker, in her official capacity; Mindy Mitnick, supervisor, individually and in her official capacity; Richard Merwin, supervisor, individually and in his official capacity; and James Christianson, supervisor, individually and in his official capacity, Appellees.	Appeal from the United States District Court for the District of Minnesota.

Submitted: May 10, 1988
Filed: October 6, 1988

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Stephen and Margaret Doe, individually and as the natural guardians of their children, appeal summary judgments entered by the district court[1] in favor of Hennepin County, the City of Mound, Minnesota, and various agencies and individuals engaged in social work for several government bodies. In an action brought under 42 U.S.C. § 1983, the Does alleged a violation of their civil rights in the handling of a complaint following reports of sexual abuse of their children. The Does' children were taken from their home for sixteen days and were returned after the allegations of abuse proved to be unfounded. The Does argue that this separation from their children, along with a failure to provide proper social services as mandated by statute, deprived them of their constitutional rights. The district court dismissed certain claims and entered summary judgment on the others, ruling that while statutes and regulations may have been violated, there was no deprivation of the Does' constitutional rights and that many of the defendants were shielded by qualified immunity. On appeal the Does argue that there were genuine issues of material fact for trial and that they are entitled to a hear-

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[1]The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

ing on their claims. We affirm the judgment of the district court.

On December 7, 1982 the Hennepin County Child Protection Division received a call from Adrian Yackley informing them that the Does' two children, ages two and five, were involved in sexually precocious behavior and that the father while under the influence of marijuana had engaged in sexual behavior involving one of the children.

Although Minnesota law required an immediate investigation and offer of protective services by the Child Care Protection Agency, the Agency did nothing until the informant called again on December 13. The Agency then reported the complaint to the city police department, which undertook an investigation on December 14. On December 17, the police visited the Does at their home to discuss the complaint. On December 20, Mrs. Doe called the Child Protection Agency and asked it to investigate the matter and provide social services. Instead of providing Mrs. Doe with the social services she requested, and without providing notice to the Does, the Agency prepared an emergency petition to remove the children from the home. On December 21, a Minnesota district court judge issued a warrant removing the Doe children from their parents' home. That evening two city police officers and two sheriff's deputies went to the Doe home and removed the children. The juvenile court held a hearing the following day at which the Does were present and represented by counsel. The juvenile court continued the emergency order, keeping the children in agency custody.

On January 5, the Does were first visited by a county social worker, who concluded there was no reason to keep the children separated from their parents. On January 6, the Does settled the matter with the agency; the Does

agreed to receive counseling by a court appointed psycologist and their children were returned to them.

The Does brought this civil rights claim under 42 U.S.C. § 1983 and a conspiracy claim under 42 U.S.C. § 1985(3). In its first order, the district court dismissed the Does' complaint as to Yackley, the informant, and dismissed the claim brought under section 1985(3). *Doe v. Hennepin County,* No. 4-84-115 (June 26, 1984). On July 1, 1987 the district court entered a summary judgment in favor of the Hennepin County defendants. The district court held that the Does failed to identify any protectable liberty interests violated by these defendants. The court followed our decision in *Myers v. Morris,* 810 F.2d 1437 (8th Cir. 1987), concluding that the government officials, having at least an arguable cause to believe that the Does were molesting their children, were entitled to qualified immunity and that neither MINN. STAT. ANN. § 626.556[2] nor the regulations[3] adopted by the state conferred con-

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[2]MINN. STAT. ANN. § 626.556 is the general statute concerning child protection. Subdivision 10 of that statute, entitled "Duties of local welfare agency upon receipt of a report", provides in part:

> The local welfare agency shall immediately investigate and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible.

[3]The Minnesota Department of Public Welfare promulgated regulations providing more specific requirements. They provide in part:

> Subp. 2. Complaints of neglect or abuse. The local social service agency must accept all complaints alleging that a

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child has been physically or sexually abused or neglected. * * * Upon receiving such complaints, the local social service agency shall immediately notify the local police or sheriff's department.

(A.) All reports shall be assessed at the time they are received to determine the agency's initial response.

For Complaints alleging that a child is * * * likely to experience physical injury due to abuse an immediate on site contact with the family and/or child is required.

When a child is not in need of immediate care but is allegedly physically or sexually abused, the local social service agency shall contact the family within 24 hours.

* * *

(B.) Where contacts with the family are required the child protection worker shall assess the validity of the complaint.

* * *

(E.) If the child protection worker determines that a child is in need of immediate care due to circumstances * * * the parents must be given the opportunity to voluntarily place the child or seek an alternative that in the worker's judgment assures the safety of the child.

(F.) If when given the opportunity the parents are unwilling or unable to cooperate, the child protection worker shall petition the court for immediate custody of the child or seek the assistance of a police officer in taking the child into custody.

* * *

Subp. 3. Keeping the child in his house. Where the need for protective intervention has been established, the local social service agency shall, whenever possible, provide services that preserve the child within the family unit while at the same time insuring the child of a safe environment.

* * *

Subp. 4. Court intervention. If services necessary to provide the child a safe environment are rejected, the child protection worker shall petition the court for authorization to intervene.

MINN. R. 9560.0208 (1982).

stitutionally protected rights, as asserted by the Does. The district court found no evidence that the defendants acted willfully or with malice, and while in conducting their investigation the defendants erred in some matters such as not providing proper notice to the Does and in not acting quickly enough, the district court determined that these errors did not constitute constitutional violations. *Doe v. Hennepin County,* No. 4-84-115 (July 1, 1987).

Finally, the district court entertained a motion to reconsider filed by the Does as well as motions for summary judgment filed on behalf of the remaining defendants. The district court denied the motion for reconsideration, entered summary judgment on the federal claims against all parties, and dismissed state law claims for lack of jurisdiction. *Doe v. Hennepin County,* No. 8-84-115 (Aug. 13, 1987). In so doing, the district court pointed out the inconsistencies of the Does' allegations. When the Does first brought the action they contended that the complaints against them were false and groundless, and that because of a failure to conduct a proper investigation, the children were improperly removed from their home. Then as the litigation proceeded, and even before the *Myers* decision, the Does changed their emphasis to the county's failure to fulfill its obligations to provide social services to them after receiving child abuse allegations.

The district court recognized that the city and county agencies had failed to follow MINN. STAT. ANN. § 626.556 and the related regulations by failing to: (1) immediately investigate the first report of sexual abuse within twenty-four hours, (2) offer the parents an opportunity to place the children voluntarily, and (3) offer protective

services before removing the children. Again the district court, citing *Myers,* concluded that even though there had been a failure to comply with applicable state laws, the statutes and regulations were not the source of a liberty interest or property entitlement giving rise to a constitutional claim. *Myers,* 810 F.2d at 1469.

On appeal the Does argue that there were genuine issues of material fact which prevent entry of summary judgment. The Does first maintain that the defendants' failure to comply with MINN. STAT. ANN. § 626.556 and related regulations before seeking to remove the Doe children from their parents' custody denied them due process. Second, the Does claim that defendants actions of judicial deception at the emergency removal hearing deprive them of a protected liberty interest without procedural due process.

I.

The Does' primary claim is that the district court erred in failing to find a deprivation of a liberty interest or property entitlement in the defendants' failure to comply with MINN. STAT. ANN. § 626.556 and related regulations. First, the Does contend that county and city officials displayed an abuse of process by failing to follow the Minnesota statute, thereby violating their liberty interest in family unity. The Does argue that if the procedures had been properly followed, they would not have suffered a traumatic separation from their children for sixteen days. The district court relied on *Myers v. Morris,* a case with remarkably similar facts. *Myers,* 810 F.2d 1437 (8th Cir.), *cert. denied,* 108 S. Ct. 97 (1987). In *Myers,* children suspected of being abused by their parents were

removed from their home by an agency of the court, which failed to comply with the procedures set out in the same Minnesota statute as is at issue here. The parents then brought a section 1983 action alleging that their due process rights were violated by the government's failure to follow the Minnesota statute. In *Myers,* we held that neither MINN. STAT. ANN. § 626.556 nor its related regulations embodied or conferred constitutionally protected rights. *Id.* at 1469. The broad language and mandate of this statute and its procedural regulations simply do not create a constitutional liberty interest in due process.

Second, the Does maintain they have a property interest in the social services required by MINN. STAT. ANN. § 626.556 and its related regulations. The Does argue that the word "shall" in the statute, which requires certain reporting and investigative procedures, creates a constitutionally protected entitlement. Again the district court properly followed *Myers* holding that in the context of the statutory scheme neither MINN. STAT. ANN. § 626.556 nor its related regulations bestow upon the Does a property interest in social services.

To enjoy a property interest in a government benefit a person must have more than an abstract need or desire for the benefit or a unilateral expectation of receiving it, but instead must have a legitimate claim of entitlement. *Board of Regents v. Roth,* 408 U.S. 564 (1972). Although the Does desired or even expected the social services set forth in the Minnesota statute, they have no legitimate claim of entitlement. To have an entitlement the benefit must be clearly definable; public assistance, social security or unemployment benefits are examples of such. *Goldberg*

v. Kelly, 397 U.S. 254 (1970). As the district court observed, the social services defined by Minnesota statutes will not be proper in some cases, and immediate separation of the family may be necessary. The provision of social services is qualified by the considerable discretion placed in the hands of those who administer it. The district court also pointed to the lack of specificity of the Minnesota statute, and it did not err in concluding that there was no specific entitlement to such services.

The Does also contend on appeal that the district court erred in its analysis by solely relying on considerations discussed in *Myers.* The Does claim that the government's acts, regardless of whether they violate MINN. STAT. ANN. § 626.556, fall below the minimum standards of due process required by the Constitution.

The Does argue that *Taylor v. Ledbetter,* 818 F.2d 791, 794 (11th Cir. 1987), recognizes a section 1983 claim where an official is charged with failing to exercise an affirmative duty.[4] *Taylor,* however, was based on a special relationship between the state and an institutionalized person and dealt specifically with injuries sustained by a child in a foster home. Because the Doe children lived at home with their parents the state could not have this type of special relationship or control over the children. The Does argue that a special relationship is given broader meaning by *Archie v. Racine,* 826 F.2d 840 (7th Cir. 1987),

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[4]*Taylor* sets forth two requirements to satisfy a section 1983 claim: the official's failure to act was a substantial factor leading to a violation of a constitutionally protected liberty interest and the responsible official displayed deliberate indifference. *Taylor,* 818 F.2d at 794.

which found such a special relationship between a fire department ambulance dispatcher and a person seeking ambulance or medical service. Rehearing en banc was granted in *Archie,* however, and with three judges dissenting, the Seventh Circuit held that a section 1983 action could not be based on a claim that violation of a state law amounted to an unconstitutional abuse of power. The court also refused to allow a claim based on the dispatcher's gross negligence, and held that the Constitution did not require the state to supply effective rescue services. *Archie,* 847 F.2d 1211 (7th Cir. 1988) (en banc). The Does' argument thus fails to convince us that the district court erred in finding no constitutional violation in the removal of the Doe children.

Additionally, the state may intervene on behalf of abused children, thereby infringing upon a parent's liberty interest in the family if the state provides an adequate postdeprivation hearing. *Davis v. Page,* 618 F.2d 374, 381 (5th Cir. 1980). The Does were provided with a postdeprivation hearing one day after the children were removed, in which the Does were represented by counsel, testified on their own behalf, and called witnesses. We affirm the district court's decision that the Does' constitutional rights were not violated.

II.

The Does also contend that because of false allegations made by agency officials in the emergency removal hearing, they were deprived of their liberty interest in family unity. The essence of the alleged deceptions, according to the Does, were false statements by agency officials that the Does were planning to send the children to

Chicago to avoid investigation and exaggerations of the childrens' precocious sexual behavior. The Does maintain that this negated the inherent procedural safeguards of the *ex parte* emergency removal hearing. This claim is barred by qualified immunity unless evidence of malice or improper motives on the part of defendants is proved. *Myers*, 810 F.2d at 1457. Allegations of malice are not sufficient to defeat immunity if the defendant acted in an "objectively reasonable manner." *Id.* at 1457 (citing *Floyd v. Farrell*, 765 F.2d 1, 6 (1st Cir. 1985)). The district court has found no evidence of willfulness or malice on the part of agency officials. The district court did note that certain allegations were exaggerated and that agency officials made false inferences at the hearing. However, these errors do not rise to the level of constitutional significance because there was no evidence of motive to fabricate evidence or malice towards the Does. We affirm the district court's ruling on this matter.

We have carefully reviewed the Does' other claims and find none of them persuasive. We therefore affirm the district court's orders, and the summary judgment entered denying the Doe claims.

HENLEY, Senior Circuit Judge, concurring.

I concur in the result reached by the court, and in main I agree with the court's reasoning, but write separately to express some misgivings about due process and shock at the manner in which these child abuse cases were handled by local officials. *Cf. Myers v. Morris*, 810 F.2d 1437, 1470 (8th Cir.) (F. Gibson, Senior Circuit Judge, concurring), *cert. denied*, 108 S.Ct. 97 (1987).

While it cannot be gainsaid that failure to follow Minnesota statutes and administrative rules does not amount to a denial of due process, what the district court may have overlooked is that, *Myers* notwithstanding, appellants may still have stated a § 1983 claim if the procedures actually followed did not comport with due process.

The right of personal choice in matters of family life is one of the liberties protected to some extent by the due process clause of the fourteenth amendment. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842-43 (1977). Defining the particular dictates of due process requires the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The private interest here, preservation of the family from governmental intermeddling, would, in my opinion, be of the highest order. As an offset, however, the government has a strong interest in protecting children from abuse and neglect.

At the very least, the parents were entitled to demand that the State conduct a minimally adequate investigation before forcibly removing the children from the home. Here, the social workers' lackadaisical attitude at the outset (*i.e.*,

failure to quickly investigate Yackley's allegations) is totally at odds with their subsequent haste in petitioning for removal of the children. Weight is added to appellants' due process claim by governmental reliance on what has been described charitably as "exaggerated" allegations and on "false inferences" by agency officials.

In the totality of the circumstances, I have serious doubt that the procedures actually followed comport with due process. Even so, I cannot disagree with the court's holding that appellees are protected by qualified immunity. The district court found no evidence of malice or improper motives. And this court, relying on *Myers, supra,* has chosen to affirm. While I think it is arguable that appellees did not act in an "objectively reasonable manner," *id.* at 1455, the result reached by the court is one with which I am not prepared to disagree.

Thus, as indicated, I concur.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5401MN

Steven Doe and Margaret Doe, etc.,	)	
	)	Appeal from the
Appellants,	)	United States
	)	District Court
vs.	)	for the District of
	)	Minnesota
Hennepin County, et al.,	)	
	)	
Appellees.	)	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 21, 1988

Order Entered at the Direction of the Court:
/s/ Robert St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

STEVEN DOE and MARGARET DOE, individually and as the natural guardians of JANE DOE and JEAN DOE, minor children,

Plaintiffs,

vs.

HENNEPIN COUNTY; HENNEPIN COUNTY COMMUNITY SERVICES DEPARTMENT SOCIAL SERVICES DIVISION—CHILD PROTECTION; HENNEPIN COUNTY COMMUNITY SERVICES DEPARTMENT SOCIAL SERVICES DIVISION—CHILD PROTECTION—ACUTE UNIT; RAYMOND AHRENS, Division Director, individually and in his official capacity; MILTON HENRY, Supervisor, individually and in his official capacity; GAIL GUTHRIE, Child Protection Worker, individually and in her official capacity; CAROLYN McHENRY, Child Protection Worker, individually and in her official capacity; JUDITH DuPRE, Legal Section Worker, in her official capacity; the CITY OF MOUND, MINNESOTA; BRUCE WOLD, Chief of the Mound Police, individually and in his official capacity; WILLIAM HUDSON,

MEMORANDUM OPINION AND ORDER

Civil 4-84-115

Sergeant of the Mound Police, individually and in his official capacity; MINDI MITNICK; SINNIKA LUNDEEN, Supervisor, individually and in her official capacity; RICHARD MERWIN, Supervisor, individually and in his official capacity; and JAMES CHRISTIANSON, individually and in his official capacity,

Defendants.

Plaintiffs Steven and Margaret Doe,[1] individually and on behalf of their children, Jane and Jean, brought this action for damages and injunctive relief against Hennepin County, several county agencies, officials and employees; the City of Mound and two of its police officials; and other individuals. The case arises from an investigation of alleged sexual abuse in the Doe family and particularly from removal of the Doe children from their home. The Doe family has been reunited, but alleges continuing harm. Plaintiffs filed this action alleging deprivation of their constitutional rights, intentional infliction of emotional distress, professional negligence, false imprisonment, abuse of process, and malicious prosecution.

At earlier stages of the litigation, the court dismissed the Does' complaint against two individual defendants, granted a motion for summary judgment on one count, and denied a motion to dismiss the entire complaint against

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[1]Plaintiffs are proceeding under the assumed name of "Doe." *See* June 28, 1983 order.

the Hennepin County defendants.[2] Discovery proceeded on the remaining claims. The Court of Appeals subsequently decided *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987) (various state actors entitled to summary judgment in civil rights action arising from allegedly improper child sexual abuse investigation). In light of *Myers* and the state of the record after discovery, this court granted the Hennepin County defendants' motion for summary judgment and the Mound defendants'[3] motion to file a belated dispositive motion. Memorandum Opinion and Order of July 1, 1987. The matter is now before the court on motion by plaintiffs for reconsideration of the July 1, 1987 order and on the Mound defendants' motion for summary judgment.

When plaintiffs first brought this action, they contended that allegations of sexual abuse "were false and without any basis whatsoever." Verified Compiaint at 8 (Feb. 16, 1984). They asserted that defendants had violated their constitutional rights in several ways: by failing to conduct a proper investigation of the charges made

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[2]The Hennepin County Defendants are the county itself, the Child Protection Division of the Community Services Department Social Services (Child Protection), the Acute Unit of Child Protection (Acute Unit) and numerous employees. At the times relevant to this complaint, defendant Raymond Ahrens was director of Child Protection, defendants Richard Merwin and James Christianson were program supervisors in Child Protection, and defendants Milton Henry and Sinikka Lundeen were social work unit supervisors. Defendants Gail Guthrie and Carolyn McHenry were Child Protection social workers and defendant Judith DuPre was a Community Services Department legal section worker.

[3]The Mound defendants are the City itself, Chief of Police Bruce Wold, and Sergeant William Hudson.

against the Does, distorting the available evidence in statements to the juvenile court, causing the Doe children to be removed from their home, continuing to interfere with the Does' lives after the family was reunited, and acting to insulate themselves and each other from liability once they discovered that there was no evidence of sexual abuse. In short, plaintiffs maintained that defendants had no justification for any involvement with the Doe family.

Even before the *Myers* decision, plaintiffs seemed to shift their emphasis. While they continued to complain that their family had been unnecessarily separated, they began to emphasize the state's obligation to provide social services to families after receiving allegations of sexual abuse.

In a letter brief submitted after *Myers*, plaintiffs conceded that defendants could not be held liable for their "profoundly bad judgment in believing baseless allegations, or in believing that a serious child abuse situation existed [or] . . . for deciding that the allegations were serious enough to warrant separation of the children from their parents." Plaintiffs' Supplemental Letter Brief at 2-3 (Feb. 13, 1987). Plaintiffs continued to press several other claims, however. They alleged that defendants had unconstitutionally failed to comply with Minn. Stat. § 626.556(10) and related administrative rules, and that they had willfully deceived judicial officers. The Does also asserted that their claims against governmental entities should survive even if those against individuals did not. Based on the record, the parties' arguments, *Myers*, and the other applicable law, the court rejected these arguments and dismissed the complaint.

Plaintiffs now argue that the court's analysis of the import of Minn. Stat. § 626.556(10) and related procedural regulations is "clearly erroneous." Plaintiffs' Memorandum at 5 (July 31, 1987). The Does contend that these state laws support a constitutional claim against both the Hennepin County defendants and the Mound defendants. Plaintiffs do not suggest that their claims against the Mound defendants materially differ from those against the Hennepin County defendants.

Minn. Stat. § 626.556(10) on which plaintiffs rely, provides in part:

> If a report alleges neglect, physical abuse, or sexual abuse by a parent, . . . the local welfare agency shall immediately conduct an assessment and offer protective services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible. When necessary the local welfare agency shall seek authority to remove the child from the custody of a parent. . . .

The Does also stress the language of regulations relating to complaints of abuse and neglect. The Minnesota Department of Welfare regulations for child protection agencies also provide that social service agency officials should contact the family immediately or within a specified time, depending on the nature of the allegations; assess the validity of the complaint; give the parents an opportunity to place children voluntarily; and "[w]here the need for protective intervention has been established . . . whenever possible, provide services that preserve the child within the family unit while at the same time insuring the child of a safe environment." 12 M.C.A.R. § 1.107.

Plaintiffs contend that defendants violated their constitutional rights by failing to comply with these mandatory procedures. Defendants concede that they did not comply with Minn. Stat. § 626.556(10) and related regulations. The record[4] supports this admission; it is uncontested that Hennepin County Child Protection workers did not immediately investigate the first report of sexual abuse within the Doe family, did not offer the Doe parents an opportunity to place the children voluntarily, and did not offer protective services before removing the children. The record now before the court, developed over the more than four years since these events took place, suggests that defendants could have protected the Doe children from any alleged abuse without removing them from their home. The question now before the court, however, is not whether defendants might have been able to do a better job, but whether their failure to comply with applicable state laws constituted a violation of the plaintiffs' constitutional rights.

In the *Myers* case, the plaintiffs asserted that certain defendants had violated Minn. Stat. § 626.556(10) and other state laws by failing immediately to assess reports of child abuse, to give the parents opportunities to place their children voluntarily, and acting to preserve the family unit. The district court, relying in part on an earlier decision in this case, concluded that these alleged violations of state law were actionable under § 1983. *In re Scott County Master Docket*, 618 F. Supp. 1534, 1565 (D. Minn. 1985). The district court also found that violation

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[4]See Memorandum Opinion and Order of July 1, 1987 at 3-11.

of these laws might strip defendants of their qualified immunity defense to alleged due process violations. *Id.* at 1566. The Court of Appeals, however, rejected the district court's analysis

> [E]ven if [Minn. Stat. § 626.556(10)] can be construed as some sort of command to avoid fragmenting families, the statute is not the source of the liberty interests in the family unit which the plaintiffs have sued to vindicate. At most, the statute establishes guidelines to be followed as a matter of state law and neither confers nor embodies any constitutionally-protected right asserted by the plaintiffs.

Myers, 810 F.2d 1469. Based on this language, the court held that the Does could not maintain a constitutional claim based on § 626.556(10) and related regulations.

Plaintiffs consider this ruling erroneous. They believe that defendants' failure to comply with state law constitutes deprivation of due process and contend that *Myers* is factually and legally distinguishable. The court has carefully considered these arguments, but they do not alter its conclusions.

Plaintiffs' first argument is based on *Bohn v. County of Dakota,* 772 F.2d 1433 (8th Cir. 1985), *cert. denied,* 106 S.Ct. 1192 (1986), which rejected a parents' challenge to Minn. Stat. § 626.556.[5] The parents asserted that § 626.556 did not provide them with an adequate opportunity to challenge charges of child abuse. The court of appeals

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[5]Only subdivision 10 is at issue in the instant case, but *Bohn* involved an examination of the entire statute. The statute also provides for mandatory reporting, good faith immunity for those who make reports, agency procedures, notice and record-keeping.

considered the *Mathews v. Eldridge* factors, 424 U.S. 319, 335 (1976), and concluded that § 626.556 and related provisions adequately protected the Bohns' interests in family privacy and autonomy. According to plaintiffs,

> Because the court in *Bohn* held that compliance with Sec. 626.556 and the procedural protections embodied in the statute leads to the conclusion that the Bohns did not have a cause of action for denial of due process of law, it necessarily follows that the failure of the defendants in the instant action to comply with the statute and the procedural protections embodied in it and the administrative rules promulgated under it leads to the conclusion that the Does do have a claim for denial of due process.

Plaintiffs' Memorandum at 4 (July 31, 1987). Plaintiffs' logic is not persuasive. The *Bohn* court held that § 626.556 and related statutory and regulatory provisions provided sufficient process; it did not hold or suggest that anything less than full compliance would constitute a denial of due process.

Plaintiffs next argue that this court's reading of *Myers* is erroneous. They would restrict *Myers* to cases in which plaintiffs rely on state statutes to challenge a right of federal constitutional origin, and attempt to distinguish their legal claims from those of the *Myers* plaintiffs.

The precise nature of the Does' various due process claims has never been entirely clear from their voluminous submissions. It appears, however, that two claims may remain. First, plaintiffs allege that defendants violated their interest in familial liberty by failing to comply with state law. Their argument appears to be this: if defen-

dants had complied with § 626.556 and related regulations, they would have seen that there was no reason to separate the Doe family, and the plaintiffs would have been spared a painful, and unnecessary, violation of their rights to privacy and autonomy. Second, plaintiffs assert that they had a state-created property interest in the social welfare service available under § 626.556.

Plaintiffs' liberty claim is not materially different from those of the *Myers* plaintiffs, and it is foreclosed by *Myers* itself:

> [U]nless the rights which form the basis of [the] plaintiffs' civil rights claims were conferred by state law, a violation of state law is neither cognizable under section 1983 nor results in forfeiture of immunity for the alleged violation of rights which have independent constitutional origin.

Myers 810 F.2d at 1469 (citing *Davis v. Scherer,* 468 U.S. 183 (1984)). Minn. Stat. § 626.556 "is not the source of the liberty interest in the family unit;" its violation does not constitute a violation of that liberty interest. *Myers,* 810 F.2d at 1469.

Plaintiffs' argument that defendants violated their property interest in social services is both new and somewhat surprising. In early proceedings, the Does argued passionately that the defendants had no place interfering in their lives. They now argue that Margaret Doe "begged" defendants to provide the family with welfare services, and that the defendants' failure to respond was violative of due process.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire

for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Plaintiffs' claim to an entitlement rests on the use, in both statute and regulations, of the word "shall." The use of such mandatory language is significant, *see, e.g., Board of Pardons v. Allen,* 107 S. Ct. 2415 (1987), but it is not determinative. *See, e.g., Myers* 810 F.2d at 1469. In the context of the entire statutory scheme, § 626.556 and its regulations did not entitle the Doe family to social services. The laws clearly anticipate the social services will not be proper in some cases and that immediate separation of the family may be necessary under certain circumstances. Moreover, this is not a case in which plaintiffs seek to obtain or retain clearly definable benefits such as public assistance, social security, or unemployment benefits which have been recognized as property rights. *E.g., Goldberg v. Kelly,* 397 U.S. 254 (1970); *Berg v. Shearer,* 755 F.2d 1343 (8th Cir. 1985). Rather, the Does assert an entitlement to unspecified "protective social services." It is not clear just what services plaintiffs requested or feel they are entitled to receive. Such lack of specificity also militates against a finding of any specific entitlement.[6]

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[6]*Cf. Archie v. City of Racine,* No. 86-1783, slip op. at 11 (7th Cir. July 14, 1987) ("The Fourteenth Amendment prohibits states from depriving individuals of their life, liberty, or property without due process of law, but generally does not create a judicially enforceable right to a minimum level of governmental services. . . . States are not the insurers of their citizens' safety and courts would be at a loss to decide when such a duty to provide services was discharged, given the many competing demands for the vast array of services that implicate interests of life, liberty and property.").

Finally, plaintiffs assert that *Myers* is distinguishable because the plaintiffs there were all parents, and the plaintiffs include the children here. Relying on *Archie v. City of Racine*, No. 86-1783 (7th Cir. July 14, 1987), plaintiffs claim that defendants had a "special relationship" with the Doe children which gives them "an action when they are endangered by the official's performance of his duties." Plaintiffs' Memorandum at 13. The facts and circumstances in the *Archie* case are distinguishable, however.[7]

Those who investigate child abuse and enforce the child abuse laws have difficult responsibilities. Erring on the side of excessive intervention treads on the precious liberty rights of parents and children. Erring on the side of too little intervention may cause serious harm to children left in perilous situations. The state has passed laws to guide decision-making which provide for immediate investigation and assistance.

In this case, compliance with the law might have removed the perceived need for taking the children from the home. "Child abuse cases should be handled cautiously from the investigative stage to the final stage, keeping in

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[7]In *Archie*, the estate and survivors of a deceased woman charged that an ambulance dispatcher had caused her death by twice failing to send her a requested rescue squad and twice giving her improper medical advice. Relying on a line of cases relating to state actors' failure to exercise their duty to protect certain people from physical harm, the court held that the dispatcher might have had a "special relationship" to plaintiffs' deceased because he had "deliberately assumed control over [her] physical welfare" and dissuaded her from seeking other assistance. *Id.* at 32. Under the extraordinary circumstances of the case, dismissal was improper and plaintiffs were entitled to attempt to show causation and malicious or arbitrary action.

mind the rights of both the children and the parents." *Myers* 810 F.2d at 1470 (Floyd R. Gibson, J., concurring). Nevertheless, it is clear from the ample record and the developing law that defendants are entitled to summary judgment and dismissal of all claims. The motion for reconsideration should be denied and that for summary judgment granted.

Accordingly, based upon the above and the Memorandum Opinion and Order dated July 1, 1987, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to reconsider is denied.

2. All defense motions for summary judgment on plaintiffs' federal claims are granted, and all remaining federal claims are dismissed with prejudice.

3. All defense motions to dismiss state law claims for lack of subject matter jurisdiction are granted, and those claims are dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 13, 1987

/s/ Diana E. Murphy
Diana E. Murphy
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

STEVEN DOE and MARGARET DOE, individually and as the natural guardians of JANE DOE and JEAN DOE, minor children,

Plaintiffs,

vs.

HENNEPIN COUNTY; HENNEPIN COUNTY COMMUNITY SERVICES DEPARTMENT SOCIAL SERVICES DIVISION—CHILD PROTECTION; HENNEPIN COUNTY COMMUNITY SERVICES DEPARTMENT SOCIAL SERVICES DIVISION—CHILD PROTECTION—ACUTE UNIT; RAYMOND AHRENS, Division Director, individually and in his official capacity; MILTON HENRY, Supervisor, individually and in his official capacity; GAIL GUTHRIE, Child Protection Worker, individually and in her official capacity; CAROLYN McHENRY, Child Protection Worker, individually and in her official capacity; JUDITH DuPRE, Legal Section Worker, in her official capacity; the CITY OF MOUND, MINNESOTA; BRUCE WOLD, Chief of the Mound Police, individually and in his official

MEMORANDUM OPINION AND ORDER

Civil 4-84-115

capacity; WILLIAM HUDSON, Sergeant of the Mound Police, individually and in his official capacity; MINDI MITNICK; SINIKKA LUNDEEN, Supervisor, individually and in her official capacity; RICHARD MERWIN, Supervisor, individually and in his official capacity; and JAMES CHRISTIANSON, individually and in his official capacity,

Defendants.

Joel Lavintman, Esq., Smith, Juster, Feikema, Malmon & Haskvitz, 1000 IDS Center, Minneapolis, MN 55402; and David E. Lasker, Esq., Buffett, Dew, Blaney, Olson & Lasker, 222 South Hamilton Street, Madison, WI 53703; appeared for plaintiffs.

Charles Sweetland, Esq., Assistant Hennepin County Attorney, A-2000 Hennepin County Government Center, Minneapolis, MN 55487, appeared for Hennepin County defendants.

Plaintiffs Steven and Margaret Doe[1] individually and on behalf of their children, Jane and Jean, brought this action for damages and injunctive relief against Hennepin County, several county agencies, officials, and employees; the City of Mound and two of its police officials; and other individuals. The case arises from an investigation of alleged sexual abuse in the Doe family and particularly from removal of the Doe children from their home. The Doe family has been reunited, but alleges continuing harm. Plaintiffs filed this action alleging depri-

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[1]Plaintiffs are proceeding under the assumed name of "Doe." See June 28, 1983 order.

vation of their constitutional rights, intentional infliction of emotional distress, professional negligence, false imprisonment, abuse of process, and malicious prosecution. In previous orders, the court dismissed the complaint against two individual defendants, granted a motion for summary judgment on one count, and denied a motion to dismiss the entire complaint against the Hennepin County defendants.[2] The matter is now before the court on the motion for summary judgment of the Hennepin County defendants.[3]

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[2]The Hennepin County Defendants are the county itself, the Child Protection Division of the Community Services Department Social Services (Child Protection), the Acute Unit of Child Protection (Acute Unit), and numerous employees. At the times relevant to this complaint, defendant Raymond Ahrens was director of Child Protection, defendants Richard Merwin and James Christianson were program supervisors in Child Protection, and defendants Milton Henry and Sinikka Lundeen were social work unit supervisors. Defendants Gail Guthrie and Carolyn McHenry were Child Protection social workers and defendant Judith DuPre was a Community Services Department legal section worker.

[3]The Hennepin County defendants initially filed their motion late last year. After the Court of Appeals decided *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), the court invited further briefing on the significance of that cases [sic] for the instant one.

Defendants Bruce Wold, William Hudson, and the City of Mound (collectively, the Mound defendants) are not parties to this motion. After *Myers*, the Mound defendants moved for leave to file dispositive motions even though the motion deadline had passed. After considering the parties' arguments, the court drafted an order granting the motion. A review of the file in the course of writing this opinion disclosed that this order was never filed, however. Under the circumstances presented and in the interest of justice, leave to file dispositive motions should be granted the Mound defendants.

BACKGROUND

On this motion for summary judgment, the court views the evidence in the light most favorable to the plaintiffs.

On December 7, 1982, Adrian Yackley called Hennepin County Child Protection and expressed concern about the Doe children to caseworker Lora Guidera. He refused to give his name, but did identify himself as a frequent visitor to the home. Yackley asserted that Margaret Doe had told him that Steven Doe had "smoked some horny pot" and "came on one of the children three times." He also reported that Jane Doe, then aged two, had made what he characterized as sexual movements while sitting on his lap, and that she had attempted to put her hands into his pants. He expressed concern that Jean, aged 4 or 5, had simulated smoking marijuana and that one of the girls had engaged in "excessive masturbation," although it is not clear whether he used that term. Guidera provided this information to her supervisor, defendant Sinikka Lundeen, an Acute Unit supervisor. Lundeen took no action on the file other than to give it two days later to defendant Carolyn McHenry of the Acute Unit, who was about to begin a vacation. Before leaving, however, McHenry discussed the matter with defendant Gail Guthrie, another Acute Unit social worker.

On December 13, 1982, Yackley again called Child Protection and was referred to Guthrie. He made essentially the same allegations he had made the previous week. Guthrie reported the second phone call to McHenry when she returned from vacation the next day. None of the Child Protection workers attempted to contact the Doe family, investigate the reliability of the anonymous complaint, or determine whether the children were in need of

immediate care. McHenry did, however, contact the Mound Police Department and share Yackley's claims with them.

The Mound Police Department commenced a criminal investigation on December 14, 1982. Sergeant William Hudson contacted a neighbor, who said she knew the children and had never seen any signs of abuse. She did report some verbal fighting within the Doe family. She also recollected on occasion on which Jane came to her house carrying a wooden "pot pipe" which Margaret Doe later identified as a "toy of the past."[4] However, this neighbor later characterized the police questioning as manipulative. Hudson also spoke with several other neighbors, but the substance of their conversations is not part of the record. McHenry's notes state that "Hudson indicated that he had talked with doctors for the children and there was nothing in the medical files at that time that had made the doctors suspicious of sex abuse." At deposition, however, Hudson characterized this statement as "false."

On December 17, 1982, Hudson and Mount Police Chief Bruce Wold, another defendant, visited Margaret Doe at her home. They informed her than [sic] an unidentified caller had twice contacted Child Protection with allegations about her family. Hudson asked Doe whether she knew someone named Adrian. Doe stated that she knew Adrian Yackley, a neighbor who had lived with the Does on two or three occasions for a few weeks due to marital problems. Doe also informed the officers that she and her husband had been participating in counseling to

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[4]Sgt. Hudson used this term. It is not clear whether the words were his, the neighbor's or Margaret Doe's.

help him deal with some problems relating to his parents. When asked if Child Protection could interview her daughter, Doe agreed.

Hudson subsequently interviewed Adrian Yackley, who admitted that he was the initial caller, elaborated on his previous statements to Child Protection, and made some additional assertions. According to Hudson, Yackley stated that he had observed Jane putting three fingers down her throat and gagging and fondling herself as if masturbating. He stated that she had tried to undress him, put her hands in his pants, and sit on his lap and make sexual movements. He also claimed to have seen Jean sticking her fingers into her vagina. He asserted that the Doe parents used marijuana at home and sometimes did not wear underwear.

On December 20, 1982, Margaret Doe contacted Child Protection and spoke with McHenry. She pleaded for Child Services to meet with the family, conduct an investigation, and provide social welfare services. McHenry agreed to meet Doe the following morning at 9:30 a.m., but subsequently rescheduled the appointment for 1:00 p.m. She told Doe that she had to be in court, but was actually meeting with defendants Guthrie, Wold, and Hudson to discuss the police investigation. Guthrie and McHenry urged Wold to issue an emergency hold, which would allow immediate removal of the children, but Wold declined to do so.

McHenry failed to appear at the rescheduled appointment. Her office informed Margaret Doe that McHenry was still in court. In fact, she and Guthrie were meeting with defendant Judith DuPre, a social worker with the

Hennepin County Community Services Legal Section, and Assistant Hennepin County Attorney Deonne Parker. DuPre prepared a petition for a warrant to remove the children from the home. The petition asserted:

> 1.0 Child Protection and Mound Police have received reports of sexual abuse of the above children, ages two and four, in that father has had the children reach inside his pants and touch his penis, and father has masterbated [sic] and then ejaculated on the children.
>
> 2.0 [Jean], age two, has sat on the lap of an adult male friend and has made movements indicating sex as if she was trying to guide him into her, has tried to undress him, and put her hands into his pants.
>
> 3.0 The children have been observed to put their fingers in their vaginas, to openly masturbate outside in the yard, to put three fingers in their throats and gag, and to play outside without clothing.
>
> 4.0 Mother said the children might be sent to Chicago to avoid investigation.
>
> 5.0 The children have been observed to simulate smoking a marijuana cigarette.
>
> 6.0 Mother said that [Jane], age five, was twice sexually molested by a twelve year old neighbor boy a couple years ago; mother did not report this to the police nor take child to the doctor.
>
> WHEREAS IT APPEARS AN EMERGENCY EXISTS

Plaintiffs assert that this petition was filled with "false, irresponsible embellishments of facts developed in the investigation" and included at least one "totally false fabrication." They assert that paragraph 1 was false be-

cause it suggested the existence of several informants when Child Protection had received only the report of Adrian Yackley. They assert that it was also false in that it suggested that both children had attempted to reach inside Steven Doe's pants, that they had touched his penis, and that he had masturbated on the children. In fact, Yackley alleged only that one child had reached inside her father's pants, had not asserted that she touched his penis, and had never said that Steven masturbated on the children, only that he "came" on one of them. Finally, plaintiffs characterize paragraph 4.0 as a "total fabrication and falsehood." Plaintiffs concede that Yackley told defendants that the Doe family might return to Chicago and send their children to the grandparents before moving themselves. Yackley never linked this comment to any fear of investigation, however.

Upon receiving the DuPre warrant petition, the Honorable Allen Oleisky, Judge of Minnesota District Court, issued a warrant, dated December 21, 1982, for the removal of the Doe children from their parents' home. At approximately 7:00 p.m. on December 21, two sheriff's deputies and two Mound police officers went to the Doe home and removed the children. They were taken to the Home Away for Tots, where they were separated.

When the children were removed, their parents were served with a petition advising them of a hearing the next day at 2:00 p.m. The Does state they were able to retain counsel at approximately midnight that night.

At the hearing before the Juvenile Court the next day, the Does were represented by counsel and had a chance to call witnesses. Yackley was not present at the

hearing. Hudson and Guidera were present, however, and testified about Yackley's assertions. Plaintiffs argue that Hudson improperly implied that Margaret Doe had given him Yackley's name when in fact he had suggested the name. They also assert that defendants presented testimony "in such a way as to intentionally and maliciously cause the erroneous impression that the reported allegations of sexual abuse came from two individual sources corroborating each other, rather than from one anonymous reporter"—Yackley. The juvenile court referee continued the emergency hold.

On December 23, social worker Thomas Price of Shea and Associates, a private agency used by Hennepin County Child Protection, interviewed Jean Doe. According to defendants, during the Price interview, Jean stated without prompting: "My daddy didn't do anything; he's a good daddy; he didn't sneak into my cunny [vagina]," "If my daddy sneaked into my cunny, they would throw him in jail," and "My mommy doesn't either."

Also during the days immediately after the December 22 hearing, defendant Yackley and his wife were subpoenaed and deposed by plaintiffs. Mrs. Yackley's deposition casts serious doubts on the veracity of her husband's allegations, plaintiffs argue, and provides reasonable explanations for the events observed. The Does further assert that the depositions demonstrated Adrian Yackley's animosity toward them. In particular, they argue Yackley suspected his wife was having an affair with Steven Doe and relay [sic] on the opinion of a psychologist that ". . . there was high degree of likelihood that Mr. Yackley was distorting and possibly fabricating reports of sexual abuse. . . ."

On January 5, Hennepin County caseworker Richard Cronk went to the Doe home and interviewed the Does and their children. This appears to have been the first time a Hennepin County employee went to the Doe home and met with the family members. The Does assert that, based on his discussions with the Does and the interview of the children, Cronk felt the allegations against the Does were without foundation. They state that Cronk told them the matter would be dropped.

On January 6, 1983, the juvenile court was to hear the Does' appeal from its December 22 order. The Does allege that they and Cronk were surprised to discover that Hennepin County had that day filed a Dependency and Neglect Petition against the Does. The parties reached an agreement, however. The juvenile court dismissed the petition without prejudice, the Does agreed to undergo regular counseling with a court-appointed psychologist, and the children were returned to their parents after sixteen days of separation.

Plaintiffs charge that the defendants acted to assist each other and insulate each other from liability by wrongfully creating the impression that the Doe family exhibited some psycho-pathological traits that would justify concern on the part of the county defendants. They allege that defendants, in particular Ahrens, attempted to convince Cronk to change his opinion to justify the actions defendants had already taken. They argue further that because Cronk refused to change his opinion, Hennepin County was ultimately forced to withdraw the petition and settle the case.

DISCUSSION

Parents and children have a "recognized . . . liberty interest . . . in the care and companionship of each other." *Myers v. Morris*, 810 F.2d 1437, 1462 (1987) (citing *Lehr v. Robertson*, 463 U.S. 248, 258 (1983)). This family liberty interest is limited, however, "by the compelling government interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Myers*, 810 F.2d at 1462. Thus, where government officials "have at least arguable probable cause to believe that adults are molesting children," *id.* at 1463, the officials are entitled to qualified immunity. *Id.* at 1463, 1466. In light of *Myers*,

> Plaintiffs concede that, to the extent any of their claims against the Hennepin County Defendants are based on the fundamental proposition that Adrian Yackley's original allegations were demonstrably false, such claims cannot be pursued in the context of a Federal civil rights law suit. . . . [Defendants] cannot be challenged for what the Plaintiffs believe was profoundly bad judgment in believing Adrian Yackley's baseless allegations, or in believing that a serious child abuse situation existed [or] . . . for deciding that the allegations were serious enough to warrant separation of the children from their parents.

Plaintiff's Supplemental Letter Brief, at 2-3. Plaintiffs assert that their claims remain alive, however, to the extent that they charge defendants with something more than misguided reliance on Yackley's questionable assertions about the family's behavior. The court considers these arguments in turn.

Plaintiffs believe that they retain a valid constitutional claim insofar as they charge defendants with failing to comply with state statutes and administrative rules governing the proper investigation of and response to charges of child sexual abuse. Specifically, plaintiffs assert that defendants were required to contact the family under investigation and provide protective serviced [sic] within 24 hours, and give the parents an option to place the children voluntarily. They characterize their interest in these social welfare benefits as a property interest which cannot be denied without due process of law.

State statutes, regulations, and even administrative rules do not, however, necessarily create protected liberty or property interests. *Myers*, 810 F.2d at 1469. Plaintiffs now stress administrative rules as a source of protected property interests, but they previously based their argument on Minn. Stat. Sec. 626.556(10). In their letter to the court of November 18, 1986, the plaintiffs claimed a property interest in the " 'social services for the purposes of . . . preserving family life whenever possible' that the local welfare agency is mandated immediately to provide. . . ." The *Myers* court specifically held that § 626.556(10) "neither confers nor embodies any constitutionally protected right asserted by the plaintiffs." *Id.* at 1469. The procedural regulations plaintiffs identify do not create protected interests any more than the statute does. Moreover, while there is authority for the proposition that there may be a property interest in government benefits, *e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970), the court is not aware of any authority requiring government officials to go out in search of potential beneficiaries so that they can receive these benefits.

Plaintiffs discuss at length the importance of early intervention in allegedly abusive families. They note recently publicized cases of abused children who died at their parents' hands after Child Protection allegedly failed to respond promptly to "serious allegations of child abuse. They assert that Child Protection could avoid tragic results of abuse and the unnecessary separation of family members by doing "what the law requires it to do, i.e., take prompt action to offer social welfare services and quickly intervene in families when allegations of abuse become known to them." But plaintiffs' argument is essentially one of public policy; it does not justify their efforts to base a constitutionally protected property right upon state administrative rules.

Plaintiffs' second argument for the survival of their claims rests on their assertion of judicial deception. They assert that the defendants, particularly McHenry and DuPre, "willfully fabricated allegations out of whole-cloth" in connection with the petition for an emergency removal order. As in *Myers*, plaintiffs allege that certain defendants "deliberately or recklessly incorporated known falsehoods into their . . . warrant applications." *Id.* at 1457.

On a motion for summary judgment, the "evidence of the non-movant[s] is to be believed, and all justifiable inferences are to be drawn in [their] favor. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986) (citation omitted). The party opposing summary judgment may not, however, rest on bald assertions of fact; "Rule 56(e) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a

party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986). "The judge's inquiry unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . ." *Anderson*, 106 S. Ct. at 2512.

The court has carefully reviewed the volumes of evidence submitted by the parties,[5] and finds no evidence of the sort of wilfulness or malice that plaintiffs allege. Many of the alleged errors in the warrant application are merely uses of ambiguous language, but others go beyond that. Paragraph 1.0 may be viewed as exaggerating the evidence Yackley provided. Paragraph 4.0 contains an inference beyond the alleged fact of Margaret Doe's comment about sending the children to Chicago. The record is clear, however, that the errors alleged do not rise to a level of constitutional significance. There is simply no evidence to suggest that defendants had any motive to fabricate evidence against Margaret and Steven Doe or that they deliberately mischaracterized any evidence. *Cf. Myers*, 810 F.2d at 1452-53 (lack of evidence of motive).

Finally plaintiffs assert that their claims against governmental entities should survive even if those against individuals do not. They contend that they have a valid claim against the institutional defendants "for perpetration of an unconstitutional custom, policy and usage." The "thrust" of this claim is "not what [defendants] did, but

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[5]A task made substantially more difficult by their failure to cite to particular pages of voluminous deposition excerpts.

what they did not do." Plaintiffs' Supplemental Letter Brief, at 10. Thus, plaintiffs charge the institutional defendants, as well as the individual ones, with violation of state laws requiring that they take certain steps to intervene in allegedly abusive families.

Plaintiffs correctly note that *Myers* concerned the interlocutory appeals of individual defendants only, but they err in assuming that *Myers* is therefore inapplicable to claims against governmental entities. "[U]nless the rights which form the basis of the plaintiffs' civil rights claims were conferred by state law, a violation of state law is [not] cognizable under section 1983. . . ." *Myers*, 810 F.2d at 1469. Plaintiffs have failed to identify a protected liberty interest created by state law, and they cannot base claims of federal constitutional violations on defendants' alleged failure to comply with state law procedures.

Plaintiffs may be correct in asserting that defendants often ignore state rules governing their work. The evidence does indicate that many of the defendants were unfamiliar with the relevant rules and regulations. It may be that defendants could have avoided the separation of the Doe family and this resulting litigation by complying with procedures which direct early and orderly investigation of allegations of child abuse and the provision of social services. Even if all of these things are true, however, plaintiffs have not shown that they constitute a deprivation of their constitutional rights on the facts of this case and under *Myers v. Morris*.

Where federal claims are dismissed before trial, the state claims should generally be dismissed as well. *United*

Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The plaintiffs' state law claims have not been central to this litigation; indeed, the court has never had reason to address them. Under the circumstances, those claims should be dismissed for lack of subject matter jurisdiction.

ORDER

Accordingly, based on the above and all the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. The Hennepin County defendants' motion for summary judgment on plaintiffs' federal claims is granted, and those claims are dismissed with prejudice.

2. The Hennepin County defendants' motion to dismiss plaintiffs' state law claims for lack of subject matter jurisdiction is granted, and those claims are dismissed without prejudice.

3. The Mound defendants' motion for leave to file dispositive motion is granted. Any such motion should be filed no later than Friday, July 17, 1987. Plaintiffs shall respond to any motion so filed no later than Friday, July 31, 1987.

Dated: July 1, 1987

/s/ Diana E. Murphy
Diana E. Murphy
United States District Judge

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1726

In The

Supreme Court of the United States

October Term, 1988

STEVEN DOE & MARGARET DOE, et al.,

Petitioners,

vs.

HENNEPIN COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER FAILURE TO FOLLOW CONSTITUTIONALLY INSIGNIFICANT STATE REGULATIONS EITHER GIVES RISE TO A CONSTITUTIONAL VIOLATION OR DEPRIVES STATE OFFICIALS WHO HAVE ACTED IN AN OBJECTIVELY REASONABLE MANNER OF QUALIFIED IMMUNITY.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Contrary to Appellants' Statement of the Case, Respondents received very specific allegations that the Appellants' two children, ages two and five, were involved in sexually precocious behavior and that their father had engaged in sexual behavior involving one of the children, while under the influence of marijuana. *Doe v. Hennepin County,* 858 F.2d 1325, 1326 (8th Cir. 1988) (Appellants' App. 3).

Specifically, on December 7, 1982, Mr. Adrian Yackley reported that he was a frequent visitor in Appellants' home, that the mother told him the father had "smoked some horny pot" and "came on one of the children three times." He repeated these allegations on December 13, 1982. Additionally, he reported that the two-year-old sat on his lap and made sexual movements. The five-year-old simulated smoking marijuana and one of the girls engaged in "excessive masturbation." Then, on December 17, 1982, Adrian Yackley repeated the allegations to the police in person and additionally asserted that he observed the two-year-old put three fingers down her throat and gag and fondle herself as though masturbating. She tried to undress him, put her hands in his pants and sit on his lap and made sexual movements. He had also observed the five-year-old stick her fingers into her vagina. He witnessed the use of marijuana by Appellants at their home. *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 30 to 32).

The children were removed from Appellants' home on December 21, 1982 pursuant to an ex parte Juvenile Court order. A hearing was held the following day at which the Appellants were represented by legal counsel, called witnesses and testified on their own behalf. The Juvenile Court continued the children in protective custody at the conclusion of the hearing, but placed them in the foster care of their aunt and uncle. The following day the children were interviewed by an independent social worker hired by Respondents for the purpose of assessing the allegations concerning the children. The five-year-

old initiated the conversation by volunteering the statements: "My daddy didn't do anything; he's a good daddy; he didn't sneak into my cunny [vagina]." "If my daddy sneaked into my cunny, they would throw him into jail," and, "My mommy doesn't either." *Doe v. Hennepin*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 35). The social worker concluded that the children had been sexually acted upon, but did not reach any conclusion as to the identity of the abuser. Affidavit of Thomas L. Price, March 27, 1984.

On January 6, 1982, a Hennepin County social worker interviewed Appellants at their home and concluded that the allegations make by Adrian Yackley were without foundation. The Juvenile Court allegations were dismissed without prejudice, but the Appellants agreed to undergo regular counseling with a court-appointed psychologist. *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 36). The children were reunited with their parents after having spent 15 days with their aunt and uncle with visitation from their parents and one day in a Children's Home.

The Appellants have conceded below that although they believe that the Respondents exercised profoundly bad judgment in believing Adrian Yackley's allegations, the Respondents cannot be held liable for "believing a serious child abuse situation existed [or] . . . for deciding that the allegations were serious enough to warrant separation of the children from their parents." *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 37).

Appellants began the instant litigation on February 16, 1984. On July 1, 1987 and upon rehearing on August 13, 1987, after a careful review of the volumes of evidence submitted by the parties, Judge Murphy (D. Minn.) granted Respondents' motion for summary judgment on the grounds that the Appellants failed to assert a valid federal claim. Juge Murphy rejected the Appellants' claim their federal constitutional rights had been violated by Respondents' failure to follow mandatory state regulations; and also rejected their claim that the Respondents were not entitled to qualified immunity based upon those same state regulatory violations. *Doe v. Hennepin County,* Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987 and August 13, 1987) (Appellants' App. 15 and 27).

REASONS FOR DENYING WRIT

I. APPELLANTS DO NOT PRESENT A VIABLE FEDERAL QUESTION.

A. FAILURE TO FOLLOW STATE REGULATIONS WHICH HAVE NO INDEPENDENT CONSTITUTIONAL SIGNIFICANCE DOES NOT CREATE A CONSTITUTIONAL VIOLATION.

Deliberate indifference to state regulations does not create a constitutional violation where the regulations themselves have no independent constitutional significance or where the injured party is not in a special relationship with the state. *Taylor v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied sub nom. Ledbetter v. Taylor,* 109 S.Ct. 1337 (1989) (special relationship and duty exists for children involuntarily placed in the foster

custody of the state); *cf. Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1338 (1989) (special relationship does not exist between city and citizen for rescue services); *Myers v. Morris,* 810 F.2d 1437 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 97 (1987) (state child abuse regulations have no independent constitutional significance).

The specific child abuse regulations at issue in the present case were addressed in *Myers,* 810 F.2d 1437. They were found to be without independent constitutional significance. Two principles underlie the ruling in *Myers.* First, it is well settled that state regulations in themselves do not establish what constitutional process is due. *Mangels v. Pena,* 789 F.2d 836, 838, 839 (10th Cir. 1986); *Equia v. Tompkins,* 756 F.2d 1130 (5th Cir. 1985); *Vruno v. Schwarzwalder,* 600 F.2d 124 (8th Cir. 1979), 130-131. Secondly, state regulations which provide for governmental services do not create constitutionally protected entitlements to such services to those not in a special relationship with the state. *Archie v. City of Racine,* 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1388 (1989); see also *DeShaney v. Winnebago County Department of Social Services,* 109 S.Ct. 998 (1989).

B. WHERE CHILDREN ARE AT RISK FROM SEXUAL ABUSE, REMOVAL FROM THE HOME FIRST, FOLLOWED BY A HEARING ON THE NEED TO REMOVE THEM IS A CONSTITUTIONALLY ADEQUATE PROCEDURE.

The Appellants have conceded below that no liability exists "in believing that a serious child abuse situation

existed [or] . . . for deciding that the allegations were serious enough to warrant separation of the children from their parents," *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (August 13, 1987) (Appellants' App. 18). Under such circumstances case law is consistently clear that the state may intervene on behalf of child victims, although it infringes upon the parents' interest in the family, where the state provides an adequate post-deprivation hearing. *Davis v. Page*, 618 F.2d 374, 381 (5th Cir. 1980), *cert. denied*, 464 U.S. 1052 (1984); *Ellis v. Hamilton*, 669 F.2d 510, 515 (7th Cir.), *cert. denied*, 459 U.S. 1069 (1982); *In re Scott County Master Docket*, Civil No. 3-85-774, slip op. at 4 (D. Minn. Nov. 2, 1987) (in a child removal context, post-deprivation remedies may be particularly appropriate).

Appellants have acknowledged the seriousness of the allegations against the father, namely, that he engaged in sexual behavior with one of his children while under the influence of marijuana. These are allegations for which an adequate post-deprivation hearing is constitutionally permitted.

The Appellants received a constitutionally adequate hearing the following day. They were represented by legal counsel, testified on their own behalf and called witnesses. Appellants rely on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) (whether a hearing is required prior to termination from employment); and *Goss v. Lopez*, 419 U.S. 565 (1975) (whether a hearing is required prior to suspension from school). Neither applies to the circumstances as here where a child's interest in freedom from parental abuse conflicts with the parents' right to have their children with them. In cases

such as *Loudermill* and *Goss*, there is usually time enough for a pre-deprivation hearing, unlike the case where a child is at risk for continued abuse.

II. THE APPELLATE COURT'S DETERMINATION THAT THE RESPONDENTS' ACTIONS WERE OBJECTIVELY REASONABLE ENTITLES RESPONDENTS TO QUALIFIED IMMUNITY IN ACCORDANCE WITH PRINCIPLES OF *ANDERSON V. CREIGHTON*, 107 S.Ct. 3034 (1987).

Respondents' are entitled to qualified immunity under the objective standard test recently set forth in *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), as applied in *Myers*, 810 F.2d at 1462. The 8th Circuit in *Myers* established that governmental officials are entitled to qualified immunity where they "have at least arguable probable cause to believe that adults are molesting children." *Myers*, 810 F.2d at 1462.

The Court below determined that the Respondents' actions were "objectively reasonable." *Doe v. Hennepin County*, 858 F.2d at 1329 (Appellants' App. 11). It is not a surprising conclusion in light of the Appellants' concession that arguable probable cause existed to believe that the Doe children were victims of sexual abuse by their father. *Doe v. Hennepin County*, Judge Murphy, D. Minn, No. 4-84-115 (July 1, 1987) (Appellants' App. 37). The Eighth Circuit's conclusion that the Respondents, under an objective test, are entitled to qualified immunity is in accord with the principles of *Anderson*, 107 S.Ct. 3034 and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The Eighth Circuit's comments regarding the existence of malice are dicta under the *Anderson* and *Harlow* test for determining qualified immunity. The determination of objective reasonableness is all that the court need have discussed to reach its conclusion that Respondents are entitled to qualified immunity. Its discussion of malice merely demonstrates that even under the older subjective test the Respondents would have been entitled to immunity.

CONCLUSION

The Eighth Circuit's opinion is well founded in case law construing Sec. 1983 and the federal constitution; the specific facts of this case present no extraordinary basis or reason justifying review by the nation's highest court. For these reasons, a writ of certiorari should not be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

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No. 88-1726

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IN THE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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PETITIONERS' REPLY BRIEF

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June 6, 1989

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondents' Brief in Opposition sensationalizes the facts of this case, while it minimizes the significant legal issues raised by the petition. However, their attempt to trivialize this case does not hold up under scrutiny.

I. RESPONDENTS' ACTIONS WERE NOT OBJECTIVELY REASONABLE, AND THE EIGHTH CIRCUIT ERRED IN HOLDING THAT RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY ON THE BASIS OF A LACK OF EVIDENCE OF MALICE OR WRONGFUL MOTIVES.

Respondents argue that in this case, "The Eighth Circuit's comments regarding the existence of malice

are dicta." Resp. Br. at 8. However, it is clear that in this case, citing *Meyers v. Morris*, 810 F.2d 1437 (8th Cir. 1987) *cert. denied* 108 S. Ct. 97 (1987), the Eighth Circuit held that government social workers enjoy qualified immunity whenever their actions are not subjectively malicious. Pet. at 17; App. 11. The holding is an actual and an aberrant doctrine. Pet. at 17-18.

The determination by the Eighth Circuit in this case that respondents' actions were "objectively reasonable" was reached under an erroneous view of the application of the law of due process. Pet. at 10-16. If the proper objective reasonableness test of *Anderson v. Creighton*, 107 S. Ct. 3034 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) were employed in this case, the government social workers would not be entitled to qualified immunity. Pet. at 18-20.

Respondents say, "The 8th Circuit in *Meyers* established that governmental officials are entitled to qualified immunity where they 'have at least arguable probable cause to believe that adults are molesting children.' " Resp. Br. at 7. However, even under their view of *Meyers* and the decision of the Eighth Circuit in this case, the question remains: for what actions may governmental officials be qualifiedly immune? While social workers with "arguable probable cause" may be immune for invoking legal procedures which pass constitutional muster, they would not enjoy qualified immunity, if they shot the father because they believed he had molested one of his daughters. Under a correct view of the law in this case, the wrongful actions[1] of the defendants violated due process prin-

[1] These actions not only were taken with deliberate indiffer-

ciples that were clearly established at the time. Pet. at 19-20.

II. A PRE-DEPRIVATION HEARING IN THIS CASE WOULD HAVE PROMOTED THE BEST INTERESTS OF THE CHILDREN AND WOULD HAVE BEEN AS FEASIBLE AND AS APPROPRIATE AS IN *GOSS v. LOPEZ* AND *CLEVELAND BOARD OF EDUCATION v. LOUDERMILL*.

Respondents say, "where children are at risk from sexual abuse, removal from the home first, followed by a hearing on the need to remove them is a constitutionally adequate procedure." Resp. Br. at 5. That may be correct in an emergency situation, and Minnesota law (as well as state law generally) reflects that reality. However, "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell v. Burson*, 402 U.S. 535, 540 (1971). In a non-emergency, the Due Process Clause requires a pre-deprivation hearing. *Id.* at 542; *see also* Pet. at 21-25.

Respondents argue that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) and *Goss v. Lopez*, 419 U.S. 565 (1975) are inapposite, because in those cases "there is usually time enough for a pre-deprivation hearing." Resp. Br. at 7. However, in the employment context, as in *Loudermill*, and in the context of a suspension from school, as in *Lopez*, there also might be emergencies in which a waiver

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ence to or reckless disregard for the best interests of the child standard. They also included falsification of allegations in the petition and the courtroom testimony presented to the juvenile court. Therefore, respondents' contention that petitioners "received a constitutionally adequate hearing," Resp. Br. at 6, is not true.

of the pre-deprivation hearing would be constitutionally permissible. The Court should grant certiorari in this case to decide whether the emergency/non-emergency distinction should be drawn in applying the Due Process Clause to the facts of this case.

Furthermore, a determination of what process is due and when under the facts of this case will quiet a nation-wide controversy over the question of when a social worker may act to deprive a family of its protected liberty interest in unity without first contacting the family members, particularly the parents. Removal of children from the family without first contacting the parents and otherwise reasonably investigating the facts is commonplace in America. *See* the comments of law professor Douglas Besharov (first Director of the National Center for Child Abuse and Neglect and currently Resident Scholar at the American Enterprise Institute, Washington, D.C.) in St. Paul Pioneer Press, Nov. 15, 1985, at D1, col. 2; *see also* Besharov, *Overreach of the Guardian State*, Wall St. J., Apr. 2, 1984, at 30, col. 3. The well-being of children and families will be served if the Court accepts this issue for resolution.

III. PETITIONERS NEVER CONCEDED AND DO NOT CONCEDE THAT RESPONDENTS LAWFULLY COULD HAVE DEMONSTRATED PROBABLE CAUSE TO BELIEVE THE CHILDREN WERE AT RISK, WHEN THEY UNDERTOOK TO REMOVE THE CHILDREN BY *EX PARTE* ACTION.

Respondents attempt to persuade this Court to deny the petition on the strength of the argument that petitioners conceded in the courts below that respondents cannot be held liable for "believing a serious child abuse situation existed [or] . . . for de-

ciding that the allegations were serious enough to warrant separation of the children from their parents." *See* Resp. Br. at 3 and 5-6.

First, petitioners do not seek to impose liability on respondents for their beliefs or their decisions. Petitioners assert that respondents are liable for *acting unfairly* in violation of petitioners' substantive and procedural rights.

Secondly, respondents' argument relies upon a distortion of the position taken by petitioners in the courts below. Respondents rest exclusively upon a quotation set forth by the district court in its first decision (App. 37) and reiterated in its second decision (App. 18). The quotation by the district court is a fragment taken from a paragraph of a thirteen page single-spaced letter brief to the district court dated February 13, 1987,[2] which was submitted shortly after the Eighth Circuit announced its decision in *Meyers v. Morris*. What was the concession? The quotation by the district court unfairly omits the footnote at the end of that paragraph in the letter brief, at 3, which states, "It should be noted that Plaintiffs do not withdraw these claims, and . . . Plaintiffs wish to preserve their claim that this aspect of the [*Meyers*] decision is in error and that their own claims remain valid and proper." Clearly, the concession that petitioners were making in the district court, for the sake of argument only, did not constitute any waiver of any claim.

Respondents attempted to raise this "concession" argument in the Eighth Circuit, but that attempt was

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[2] Exhibit C to Affidavit of Attorney David E. Lasker dated September 30, 1987 (R. Doc. CX) at 2-3.

not countenanced by the court of appeals. Respondents argued to the Eighth Circuit that petitioners "have conceded that in their case arguable probable cause existed to believe that the Doe children were being molested." Brief of Appellees at 2 and 18. Petitioners responded to that argument, saying, "the only point which the plaintiffs concede is that the *allegations* were serious." Reply Brief of Appellants at 19. "The decision that the allegations were probably true was the direct and proximate result of the defendants' own failure to do what the law required of them— not the true existence of probable cause or even the reasonable belief in the existence of probable cause under the circumstances of this case." *Id.*

Indeed, the failure of respondents to conduct a social work investigation, including contact with the parents and the children, and their deliberate indifference to the best interests of the child standard—*i.e.*, the failure of respondents to do what the Constitution (and state law) required of them (*see* Pet. at 10-16)—left respondents with nothing but allegations upon which to base the decision to act. Because of their deliberate indifference to the constitutional rights of the petitioners, respondents could not have demonstrated probable cause to believe the children were at risk. Petitioners have never conceded otherwise.

Thirdly, even if petitioners had made the concession that respondents suggest, such a concession would not be germane to the issue of liability, as respondents argue. The question of whether respondents could have demonstrated probable cause to believe the children were at risk, had due process been afforded, is

only peripherally relevant to the issue of damages. *See Carey v. Piphus*, 435 U.S. 247 (1978).

IV. THE ALLEGATIONS BY THE ANONYMOUS CALLER ONLY RAISED THE QUESTION OF WHETHER THE CHILDREN WERE AT RISK IN THE HOME.

Respondents attempt to make it appear that they had proof that the Doe children were being sexually abused by their father, when they petitioned the juvenile court for an *ex parte* order removing the children from the home. Resp. Br. at 1-2. They present an inaccurate[3] precis of the allegations as described by the district judge at App. 30-32. *Id.* at 2. Even when read in a light most favorable to respondents' contention that they "received very specific allegations," *Id.* at 1, the fact remains that the substance and meaning of the allegations were unclear. For example, what is meant by such allegations as "one of the girls engaged in 'excessive masturbation,' " or the two-year-old "tried to undress him" and "made sexual movements"? Even the allegation that "the mother told him the father had 'smoked some horny pot' and 'came on one of the children three times' " requires an interpretation of what Mr. Yackley thought he

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[3] Counsel for respondents persist in adhering to embellishment similar to that of their clients. For example, they say that Mr. Yackley reported that the two year old "put her hands in his pants," while the fact is he said "that she had attempted to put her hands in his pants." *Compare* Resp. Br. at 2 with App. 30. Likewise, for example, they say Yackley "witnessed the use of marijuana" by the Does, while the fact is he only "asserted that the Doe parents used marijuana at home." *Compare* Resp. Br. at 2 with App. 32. The distinction between observations and assertions and between attempts and actual acts is important in evaluating the significance of uncorroborated allegations.

heard and an interpretation of what the mother was intending to tell him.

Thus, the assertion that respondents had *evidence* of abuse to the children, when they took action to remove the children from the home, is not correct. Allegations are not evidence. Undoubtedly, that is why the Minnesota statutes and regulations (like those in virtually every state) require an investigation of the facts by the social worker, including contact with the parents and the children, prior to any petition to the juvenile court. That respondents had mere allegations and not evidence is apparent from the fact that the police concluded at the end of *their* investigation[4] that they lacked evidence of any emergency. Pet. at 4.

The facts alleged by the anonymous caller only raised the question of whether the children were at risk in the home. A social work investigation, ultimately commenced on January 5, 1983 by caseworker Richard Cronk, led to the immediate conclusion that the allegations made by Yackley were without foundation. Pet. at 6; Resp. Br. at 3. Thus, the evidence in the record demonstrates only that petitioners were harmed by the wrongful actions of the respondents.

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[4] The only investigation in this case was the investigaion conducted by the police to determine whether to bring criminal charges or to exercise the emergency police power to take the children into custody. Pet. at 3-4. Respondents knew all that the police knew, and nothing more, when they acted to effect removal of the children from the home. *Id.*

CONCLUSION

For these reasons, the relief requested in the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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